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2507  
No. 11799

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

UNITED PACIFIC INSURANCE COMPANY, a corporation,

Appellant,

vs.

THE OHIO CASUALTY INSURANCE COMPANY,  
a corporation, R. H. McKEON, individually,  
GEORGE B. PAGE, individually, R. H. McKEON  
and G. B. PAGE, doing business under the fictitious  
name of Pacific Laundry and Dry Cleaners;  
GEORGE B. PAGE, individually and doing business  
under the fictitious name of Mission Linen and  
Towel Supply Company; FLOYD GILBERT,  
ROBERT ECHOLS and BEVERLY ECHOLS,

Appellees.

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**TRANSCRIPT OF RECORD**

Upon Appeal From the District Court of the United States  
for the Southern District of California

Central Division

**FILED**

MAR 19 1948

**PAUL P. O'BRIEN, CLERK**





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**IN THE**

**United States Circuit Court of Appeals**

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a corporation, R. H. McKEON, individually,  
GEORGE B. PAGE, individually, R. H. McKEON  
and G. B. PAGE, doing business under the fictitious  
name of Pacific Laundry and Dry Cleaners;  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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RAYMOND G. BROWN

810 South Spring Street

Los Angeles 14, Calif.

For Appellee Ohio Casualty Insurance Company:

PARKER, STANBURY & REESE

707 South Hill Street

Los Angeles 14, Calif.

For Appellees Robert Echols et al.:

A. H. BRAZIL

San Luis Obispo, Calif. [1\*]



In the United States District Court for the  
Southern District of California  
Central Division

Civil No. 6024-WM

UNITED PACIFIC INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

THE OHIO CASUALTY INSURANCE COMPANY,  
a corporation, R. H. McKEON, individually;  
GEORGE B. PAGE, individually; R. H. McKEON  
and G. B. PAGE, doing business under the fictitious  
name of PACIFIC LAUNDRY AND DRY  
CLEANERS; GEORGE B. PAGE, individually  
and doing business under the fictitious name of MIS-  
SION LINEN AND TOWEL SUPPLY COM-  
PANY; FLOYD GILBERT; ROBERT ECHOLS  
and BEVERLY ECHOLS,

Defendants.

## COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff complains and alleges:

### I.

That this is a civil action for a declaratory judgment,  
brought under the provisions of Section 274-d of the  
Judicial Code, as amended. 28 U. S. C. A. 400.

### II.

That plaintiff is a corporation duly organized and exist-  
ing under and by virtue of the laws of the State of  
Washington, for the purpose, among other things, of

engaging in the business of insuring persons against the liability imposed upon them for damages arising out of the ownership, maintenance [2] and use of motor vehicles. That plaintiff is duly admitted and licensed to transact such business in the State of California and is a citizen of the State of Washington, having its Home Office and principal place of business in Tacoma, in said State.

### III.

That defendant, The Ohio Casualty Insurance Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio for the purpose, among other things, of engaging in the business of insuring persons against liability imposed upon them by law for damages arising out of the ownership, maintenance and use of motor vehicles and is a citizen of the State of Ohio, maintaining its Home Office and principal place of business in the City of Hamilton, in said State.

### IV.

That the defendants, R. H. McKeon, George B. Page, sometimes known as G. B. Page, Floyd Gilbert, Robert Echols and Beverly Echols are natural citizens of the State of California, residing within the Southern District of the United States District Court for the State of California.

### V.

That there is a diversity of citizenship among and between plaintiff and each and all of said defendants, and that the amount in controversy herein exceeds the amount of \$3,000.00, exclusive of interest and costs.

## VI.

That the defendant, George B. Page, also known as G. B. Page, engages in various business enterprises, sometimes as an individual and at other times as a co-partner under fictitious names, two of which said enterprises are Mission Linen and Towel Supply Company and Pacific Laundry and Dry Cleaners. That the defendants, George B. Page, sometimes known as G. B. Page and R. H. McKeon are co-partners in the conduct of the business enterprise known and conducted under the fictitious name of Pacific Laundry and Dry Cleaners.

## VII.

That on or about the 18th day of September, 1945, in consideration of the premium paid, plaintiff issued to the defendant, George B. Page, [3] individually and doing business as Mission Linen and Towel Supply Company and H. B. Page, individually and doing business as Model Linen Supply Company and George B. Page, doing business as Modern Linen Supply Company, hereinafter designated as the "insured", and effective for a term of one year from and after said date, its policy of automobile liability and property damage insurance, Number CLP 11184, covering a certain 1940 G.M.C. Panel Truck, Motor Number 22837053. That said policy was issued by plaintiff and accepted by said insured in consideration of the statements contained in the Declarations forming a part thereof and subject to the limits of liability, exclusions, conditions, and agreements therein contained. That a copy of said policy is attached hereto, marked "Exhibit A", and by this reference made a part hereof, the same as if fully restated herein.



### VIII.

That said policy of insurance provided that plaintiff would pay on behalf of said insured all sums which said insured might be obligated to pay by reason of the liability imposed upon said insured by law for damages, caused by bodily injuries and damage to property of others, including death at any time resulting therefrom, sustained by any person or persons caused by accident and arising out of the ownership, maintenance and use of said motor vehicle. That plaintiff further agreed in and by said policy with said insured to provide a defense of any suit or suits brought against said insured alleging such injuries and seeking damages by reason thereof. That the limits of liability contained in said policy of insurance were \$10,000.00 as applicable to injury or death of one person, and subject to that limit for each person, the sum of \$25,000.00 for each accident giving rise to claims or suits against said insured and the sum of \$5,000.00 for damage to property of other persons. That said policy of insurance was in full force and effect at all times hereinafter mentioned.

### IX.

That said policy of insurance contained, among other things, the following provision:

“Other Insurance—If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability of this policy is [4] in excess of the applicable limit provided by the other insurance available to the insured this policy shall afford excess insurance over and

above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy. It is further provided that in respect of loss arising out of the operation, maintenance or use of any non-owned automobile other than a hired automobile, the applicable insurance afforded by this policy shall be excess over and above such other available insurance. Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance which is available to the insured."

#### X.

That sometime prior to the 16th day of January, 1946, the exact day being unknown to plaintiff, the defendant, The Ohio Casualty Insurance Company, in consideration of a premium duly paid, issued to the defendants, R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, hereinafter designated as "said assured", its policy of automobile liability and property damage insurance, numbered CLP 2454. In and by the terms of said policy of insurance, the defendant, The Ohio Casualty Insurance Company agreed to and did indemnify said assured against the liability imposed by law for damages arising out of bodily injuries, including death at any time resulting therefrom, caused by accident and arising out of the operation, maintenance and use of motor vehicles. Said defendant further agreed in and by the terms of said policy of insurance, to provide a defense of any suit or suits brought against said assured alleging such injuries and seeking damages on account thereof. The limits of

liability contained in said policy of insurance were \$25,000.00 as applicable to injury or death of one person, and subject to that limit for each person, the sum of \$50,000.00 for each accident giving rise to claims or suits against said assured and the sum of \$5,000.00 for damage to the property of others. That said policy of insurance was in full force and effect at all times hereinafter mentioned.

## XI.

That said policy of insurance so issued by defendant, The Ohio Casualty Insurance Company, contains, among other things, the following provision:

### “DEFINITIONS” [5]

“(1) \* \* \*

(2) If the Named Assured is a corporation or a co-partnership the word “Assured” wherever used in this policy shall include executive officers, directors or co-partners respectively, in their capacity as such.”

## XII.

That sometime immediately prior to the 16th day of January, 1946, the defendant, George B. Page, individually, and doing business under the fictitious name of Mission Linen and Towel Supply Company, leased or rented the motor vehicle hereinabove, and in said policy of insurance described and issued by plaintiff, to R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners for their use in the conduct of the business of said last named partnership enterprise. That on or about the 16th day of January, 1946, the defendant, Floyd Gilbert was driving and operating said motor vehicle on and about the

business of R. H. McKeon, and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners and while so engaged in the business of said defendants, became involved in an accident resulting in personal injuries of a serious nature to the defendants, Robert Echols and Beverly Echols and in damage to the property of the defendant, Robert Echols. That said last named defendants have made claim against plaintiff and against each and all of the other defendants named in this action. That said defendants, Robert Echols and Beverly Echols have brought an action for damages against the defendants, R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners and G. B. Page, doing business individually under the fictitious name of Mission Linen and Towel Supply Company and Floyd Gilbert in the Superior Court of the State of California in and for the County of San Luis Obispo, said action being numbered 15733 on the dockets of said court; and demand has been made upon plaintiff by the defendants, R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, to provide a defense to said action, and they have tendered the defense of said action to plaintiff. Said last named defendants contend that plaintiff is bound and obligated to provide a defense to said action, by and through its attorneys, and to pay any judgment recovered therein, up to [6] the limits of liability contained in its said policy of insurance.

### XIII.

That an actual controversy exists among and between the plaintiff and each and all of the defendants. That



it is the position of plaintiff that its said policy of insurance, while in full force and effect, does not apply to and cover said accident of January 16, 1946, for the reason that said policy of insurance so issued by defendant, The Ohio Casualty Insurance Company, contains higher limits of liability and covers said accident to the exclusion of the policy issued by plaintiff. That the defendant, The Ohio Casualty Insurance Company contends that the liability of the plaintiff is primary, and that its liability, if any, is secondary, and that its policy of insurance applies only after the limits of liability stated in the policy of insurance issued by plaintiff have been exhausted.

That each and all of the individual defendants to this action claim plaintiff has primary liability by reason of said accident of January 16, 1946; that plaintiff is bound and obligated to provide a defense to said action for damages, numbered 15733 on the dockets of the Superior Court, San Luis Obispo County, California, and pay any judgment recovered therein up to the limits of liability contained in said policy.

That it is the further position of plaintiff that its policy of insurance, while in full force and effect, does not apply to and cover said accident of January 16, 1946, for the reason that said motor vehicle at the time of said accident was being used exclusively in the business of R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, and that the policy of insurance of defendant, The Ohio Casualty Insurance Company covers and applies to said accident to the exclusion of the policy issued by the plaintiff.

Wherefore, plaintiff prays:

(a) That the Court order a speedy hearing of this action and advance it on the calendar as provided in Rule 57, of the Rules of Civil Procedure of the District Courts of the United States;

(b) That upon final hearing hereof, this Court enter a [7] declaration that said policy of insurance so issued by plaintiff does not apply to and cover said accident of January 16, 1946; but that the policy of insurance issued by the defendant, The Ohio Casualty Insurance Company, applies to and covers said accident to the exclusion of the insurance afforded by plaintiff; that plaintiff is not bound or obligated to provide a defense to said action numbered 15733 now pending in the Superior Court of the State of California in and for said County of San Luis Obispo, and that plaintiff is not bound or obligated to pay any judgment recovered in said action by the defendants, Robert Echols and Beverly Echols, against the defendants, R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners and George B. Page, doing business individually under the fictitious name of Mission Linen and Towel Supply Company and Floyd Gilbert; and

(c) For such other and further relief, both general and special, as to this Honorable Court may seem just, meet and proper.

HARRY E. SACKETT

Attorney for Plaintiff

RAYMOND G. BROWN

Attorney for Plaintiff

[Verified.] [8]

"EXHIBIT A"

Comprehensive Bodily Injury

and Property Damage

Liability Policy

Policy No. CLP 11184

Agent James McCloskey

[Crest] "

UNITED PACIFIC INSURANCE COMPANY

Tacoma, Washington

DECLARATIONS

1. The named insured is George B. Page, Individually and DBA Mission Linen and Towel Supply Company and H. B. Page Individually and DBA Model Linen Supply Co., and George B. Page DBA Modern Linen Supply Company.
2. Post office address of insured 723 E. Montecito St., Santa Barbara, California.
3. The policy period shall be from September 18, 1944 to September 18, 1947 at 12:01 A. M. standard time at the insured's above designated post office address as to each of said dates.
4. Provisional deposit premium payable on effective date is \$609.72, on first anniversary \$609.72 and on second anniversary \$609.72.
5. Policy is subject to Annual audit.
6. Named insured's principal business operations are Laundry, Linen & Towel Supply.

7.

		Limits of Liability			
		Coverages are "Included" or "Excluded"	Each Person	Each Occurrence	Aggregate
Description of Coverages					
Bodily Injuries Cov- erage :					
A	(1) Automobiles	Included	\$10,000.	\$25,000.	Not appli- cable
	(2) Products	Included	\$10,000.	\$25,000.	\$25,000.00
	(3) All other exposures	Included	\$10,000.	\$25,000.	Not appli- cable
Property Damage Coverages :					
B	Automobiles	Included	Not appli- cable	\$ 5,000.	Not appli- cable
C	(1) Products	Excluded	Not appli- cable	\$ — —	\$ — —
	(2) All other exposures	Excluded	Not appli- cable	\$ — —	{ \$ — — operations, \$ — — protective, \$ — — contractual
8. Insured's records are kept and may be audited at above post office address or at No Exceptions.					
9. No insurer has canceled or declined any bodily in- jury or property damage liability insurance for the named insured during the past year, except No Ex- ceptions.					
10. The premium for this policy is modified by reason of the insured's having in effect at inception date of this policy the following insurance:					

Name of Insurance Carrier	Policy No.	Coverage Afforded	Limits of Liability	Expiring
None				

The terms printed on the back of this page and numbered 1 to 76 inclusive, are hereby made a part hereof, and this page, when countersigned by a duly authorized agent of the company, together with United Pacific Insurance Company page of terms numbered 77 to 172 inclusive shall constitute the above numbered policy.

UNITED PACIFIC INSURANCE COMPANY

J W Reynolds President.

Countersigned at Santa Barbara, Calif.

by.....

Authorized Agent. [9]

Specimen.

UNITED PACIFIC Insurance Company

Does Hereby Agree with the named insured, in consideration of the premium, subject to the limits of liability and other terms of this policy:

To Pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability for damages (1) imposed upon him by law or (2) assumed or retained by him under any warranty of goods or products, or under any contract or agreement wholly in writing which liability, without such contract or agreement, would not attach, Because Of—

Coverage A—Bodily Injury, Sickness or Disease, including Death at any time resulting therefrom, sustained by any person or persons:

Coverage B—Injury To or Destruction Of Property, including loss of use thereof, arising out of the ownership, maintenance or use of any Automobile;



Coverage C—Injury To or Destruction Of Property Of Others, including loss of use thereof, caused by accident and arising from exposures not described in Coverage B.

\*   \*   \*   \*   \*   \*   \*   \*

(4) any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the named insured, and also any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured.

\*   \*   \*   \*   \*   \*   \*   \*

Other Insurance—If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability of this policy is in excess of the applicable limit provided by the other insurance available to the insured this policy shall afford excess insurance over and above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy. It is further provided that in respect of loss arising out of the operation, maintenance or use of any non-owned automobile other than a hired automobile, the applicable insurance afforded by this policy shall be excess over and above such other available insurance. Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance which is available to the insured.

\*   \*   \*   \*   \*   \*   \*   \*

[Endorsed]: Filed Nov. 26, 1946. Edmund L. Smith, Clerk. [10]

[Title of District Court and Cause]

SEPARATE ANSWER OF DEFENDANT THE  
OHIO CASUALTY INSURANCE COMPANY,  
A CORPORATION

Comes now the defendant, The Ohio Casualty Insurance Company, a corporation, and severing from its co-defendants and answering for itself alone affirms, denies and alleges, as follows:

I.

In answer to paragraphs VII, VIII and IX of plaintiff's complaint this defendant states that it lacks sufficient information, knowledge or belief to enable it to answer and on that ground denies each and every allegation contained in the said paragraphs and each and every part of each thereof. It is informed and believes and therefore alleges that an insurance policy was issued by the plaintiff Company to George B. Page, a defendant herein, individually and doing business as the Mission Linen and Towel Supply Company covering a certain 1940 GMC panel truck, motor number 2283705 and that said policy of insurance covered the said George B. Page [11] individually and doing business as the Mission Linen and Towel Supply Company and the said 1940 GMC panel truck on the day of January 16, 1946 at the time of an accident in which the said motor vehicle was involved. That said policy of insurance provided that the plaintiff would pay on behalf of the said insured all sums which said insured might be obligated to pay by reason of liability imposed upon said insured by law for damages caused by bodily injuries and damage to property of others including death at any time resulting therefrom

sustained by any person or persons caused by an accident arising out of the ownership, maintenance or use of said motor vehicle. That plaintiff further agreed in and by said policy with said insured to provide a defense of any suit or suits brought against said insured alleging such injuries and seeking damages by reason thereof.

## II.

In answer to paragraph X of plaintiff's complaint this defendant admits that on or about the 24th day of March, 1945 this defendant in consideration of a premium duly paid, issued to defendant R. H. McKeon and G. B. Page, doing business as Pacific Laundry and Dry Cleaners its policy of comprehensive bodily injury, liability and property damage CLP 2454. Denies each and every other allegation contained therein except that it admits that the limits of liability contained in said policy of insurance were \$25,000.00 as applicable to the death or injury of one person and subject to that limit for each person the sum of \$50,000.00 for each accident giving rise to claims or suits against said insured or coming under the terms of said policy and the sum of \$5000.00 for damage to the property of others for losses coming under the terms of said policy of insurance. That said policy of insurance was in full force and effect on the 16th day of January, 1946 and in that connection defendant alleges that under the terms of said policy it agreed to pay on behalf of the insured all sums which the insured should become obligated to pay [12] by reason of the liability imposed upon him by law because of bodily injury, disease or illness including death at any time resulting therefrom sustained or alleged to have been sustained within the policy period by any person or persons. Under the terms

of said policy it was extended with respect to automobiles owned by or registered in the name of the named insured and said policy of insurance contained the following provisions:

“Other Insurance.—If other valid insurance or indemnity exists protecting the Assured or any person or organization entitled to protection hereunder from liability for bodily injury, disease, illness or death, or for damage to property of others, this policy shall not apply in respect to such specific hazard otherwise covered, whether the Assured is specifically named in such policy or not; provided, however, that if the limits of insurance in this policy are in excess of the limits provided by said other insurance this policy shall provide excess insurance against said hazard in an amount sufficient to give the Assured a combined amount of protection equal to the limits of this policy.”

That further it is provided by general endorsement Number (3) attached to said policy, dated March 24, 1945 as follows:

“It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; of his liability in connection with other business activities as an individual, a member of other partnerships a receiver, a director, or an executive officer of a corporation.”

That a copy of said policy including all endorsements thereon is attached hereto and incorporated herein as if fully set forth and denominated Exhibit “A”.

## III.

In answer to paragraphs XI and XII of plaintiff's [13] complaint this defendant admits the allegations therein contained.

## IV.

In answer to paragraph XIII of plaintiff's complaint this defendant admits that each and all of the individual defendants to this action claim plaintiff has primary liability by reason of said accident of January 16th. That plaintiff is bound and obligated to provide a defense to action number 15733 on the docket of the Superior Court of San Luis Obispo County, California, and to pay any judgment recovered therein up to the limits of said policy.

This defendant, The Ohio Casualty Insurance Company, admits that it contends that the liability of the plaintiff is primary and that its liability, if any, is secondary and that its policy of insurance applies only after the limits of liability stated in the policy of insurance issued by the plaintiff have been exhausted. States that it lacks sufficient information or belief to deny each and every other allegation contained in the said paragraph and each and every part of each thereof.

Wherefore, this defendant prays that upon a hearing of this matter this court enter a declaration that said policy of insurance issued by the plaintiff does apply to and cover said accident of January 16, 1946. That the policy of insurance issued by this defendant does not apply to and cover said accident of January 16, 1946 and



any liability arising therefrom on the part of R. H. McKeon and G. B. Page, doing business as Pacific Laundry and Dry Cleaners, or anyone else until the limits of plaintiff's contract are reached and then only as to the liability of the defendant R. H. McKeon and G. B. Page, doing business as Pacific Laundry and Dry Cleaners, after the limits of liability of plaintiff United Pacific Insurance Company have been reached. That the court further decrees that the plaintiff is bound and obligated to provide a defense to said action number 15733 now pending in the Superior Court, State of California, in and [14] for said County of San Luis Obispo and is bound and obligated to pay any judgment recovered in said action by the defendants herein Robert Echols and Beverly Echols against the defendant R. H. McKeon and G. S. Page, doing business as Pacific Laundry and Dry Cleaners, and George B. Page, doing business individually under the fictitious name of Mission Towel Supply Company and Floyd Gilbert to the limit of its contract and for such other and further relief both general and specific as to this Honorable Court may seem just, meet and proper.

PARKER, STANBURY & REESE

By Richard E. Reese

Attorneys for Defendant, The Ohio Casualty Insurance  
Company, a Corporation

[Verified.] [15]

“EXHIBIT A”

CLP 2454              Comprehensive Liability Policy  
                            (Including Property Damage for Automobiles)

THE OHIO CASUALTY INSURANCE COMPANY  
                            of Hamilton, Ohio  
                            (A Stock Company)

See End

- | Item | Declarations   |
|------|--|
| 1.   | Name of Assured    R. H. McKeon and G. B. Page<br>dba Pacific Laundry & Dry Cleaners   |
| 2.   | Post Office Address    110 State Street, Santa Bar-<br>bara, California  |
| 3.   | The Assured is    Co-partnership<br>(Individual, Co-Partnership, Corporation)  |
| 4.   | Policy Period: From March 24, 1945 to March 24,<br>1946 commencing and ending at 12:01 A. M. Stand-<br>ard Time at the address of the Named Assured as<br>stated herein.   |
| 5.   | Limits of Liability:    \$25,000.00 each person;<br>\$50,000.00 each occurrence.<br>\$ 5,000.00 Automobile Prop-<br>erty Damage Liability  |
| 6.   | Nature of Assured's business: Laundry and dry<br>cleaning  |
| 7.   | The provisional deposit premium is \$285.19 payable<br>\$285.19 in advance and \$..... on 1st an-<br>niversary, \$..... on 2nd annivervy, subject<br>to the provisions of Conditions 5 and 6 of this<br>Policy. The sums of the Minimum Premiums re-<br>ferred to in Conditions 5 and 6 of this Policy shall<br>in no event be considered as less than \$100.00. |

8. No liability insurance has been declined or cancelled by any company during the past three years, except as follows: No exceptions

Countersigned

This 16 day of March 1945. By St. Clair Morton lmk

Agent

Santa Barbara, California [16]

at

Specimen

\* \* \* \* \*

### AUTOMOBILE EXTENDED COVERAGE

With respect to automobiles owned by or registered in the name of the Named Assured the unqualified word "Assured" wherever used in this policy includes not only the Named Assured but also any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured.

\* \* \* \* \*

3. Subrogation In the event of any payment under this policy the Company shall be subrogated to all the Assured's rights of recovery therefor and the Assured shall execute all papers required and shall do everything that may be necessary to secure such rights.

4. Other Insurance If other valid insurance or indemnity exists protecting the Assured or any person or organization entitled to protection hereunder from liability for bodily injury, disease, illness or death, or for damage to property of others, this policy shall not apply in respect to

such specific hazard otherwise covered, whether the Assured is specifically named in such policy or not; provided, however, that if the limits of insurance in this policy are in excess of the limits provided by said other insurance this policy shall provide excess insurance against said hazard in an amount sufficient to give the Assured a combined amount of protection equal to the limits of this policy.

\*   \*   \*   \*   \*   \*   \*   \*   \*   \* [17]

#3

### GENERAL ENDORSEMENT

It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; or his liability in connection with other business activities as an individual, a member of other partnerships a receiver, a director, or an executive officer of a corporation.

Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the policy other than as above stated.

To be attached to and forming a part of Policy No. CLP 2454 issued to R. H. McKeon, Et Al by

THE OHIO CASUALTY INSURANCE CO.

Howard Slamkis

President

This endorsement effective March 24, 1945

----- Agent [18]

## GENERAL ENDORSEMENT

It is hereby provided that in the event of any material change in or cancellation of the within numbered policy, notice of such change or cancellation will be given to the Exchange Officer of Camp Cooke or Santa Barbara, California.

Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the policy other than as above stated.

To be attached to and forming a part of Policy No. CLP 2454 issued to R. H. McKeon, Et Al by

THE OHIO CASUALTY INSURANCE CO.

Howard Slamkis

President

This endorsement effective March 24, 1945

..... Agent [19]

## CERTIFICATE OF INSURANCE

THE OHIO CASUALTY INSURANCE COMPANY  
HAMILTON, OHIO

Issued to: Camp Cooke Post Exchange

Issued to: Camp Cooke Post Exchange

Camp Cooke

Street

California

City

State

The Ohio Casualty Insurance Company does hereby certify that the following described policy has been issued and is in force at this date.



24      *United Pacific Insurance Company, etc. vs.*

Policy No. CLP-2454. Policy Period 3-24-45 to 3-24-46

Inception      Expiration

Name of Insured R. H. McKeon and G. B. Page dba  
Pacific Laundry and Dry Cleaners, (and Fashion  
Cleaners) (and Mission Laundry & Cleaners)

Post Office Address 110 State St., Santa Barbara, Calif.

Street

City

State

Coverages and Limits of Liability

Bodily Injury Liability	\$25,000.00	Each Person
	\$50,000.00	Each Accident
Property Damage Liability	\$ 5,000.00	Each Accident

Description of Risk: Coverage applies to all automobiles owned or operated by the insured, and in addition, miscellaneous Bodily Injury Liability exposures, on a Comprehensive Policy form basis.

The Ohio Casualty Insurance Company will not notify the party to whom this certificate is addressed in the event of any change in or the cancellation of the policy, unless this certificate has been modified to provide that such notice is necessary.

State any modification here:

Countersigned at: Santa Barbara, Calif. date 11/21/45

THE OHIO CASUALTY INSURANCE COMPANY

By.....

(Important: Copy of Any Certificate Issued Must Be  
Furnished to the Company)

[Endorsed]: Filed Dec. 16, 1946. Edmund L. Smith,  
Clerk. [20]

[Title of District Court and Cause]

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Harry E. Sackett, Raymond G. Brown, plaintiff's attorneys, whose address is 810 South Spring St., Los Angeles 14, California, an answer to the complaint which is herewithin served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court]

EDMUND L. SMITH

Clerk of Court

By Edward F. Drew

Deputy Clerk.

Date: 11/26/46.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. [21]

Southern District of California, ss.

I hereby certify and return, that on the 5 day of Dec., 1946 I received the within Summons and Complaint and that after diligent search, I am unable to find the within-named defendant Floyd Robert Gilbert within my district.

Former employers state he left for State of Washington, no forwarding address. Parole officer of St. Barbara may know. Unable to contact today.

ROBERT E. CLARK

United States Marshal

By T. R. Keefe

Deputy United States Marshal [22]

Received Nov. 27, 1946. United States Marshal, Criminal Dept. Los Angeles, Calif.

[Endorsed]: Filed Jan. 3, 1947. Edmund L. Smith, Clerk. [23]

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[Title of District Court and Cause]

ANSWER OF DEFENDANTS, ROBERT ECHOLS  
AND BEVERLY ECHOLS

Comes now the Defendants, Robert Echols and Beverly Echols, and jointly and severally answer Plaintiff's Complaint for Declaratory Judgment, as follows:

I.

These Defendants, not having any exact knowledge, information or belief, as to the allegations contained in several of the paragraphs in Plaintiff's Complaint but believing the same to be true, including the allegation that certain adverse claims are made by, between and against each of said insurance companies, these Defendants do not contest the allegations of said Complaint except as hereinafter more particularly set forth.

II.

These Defendants allege that the trial of the case [24] referred to in Plaintiff's Complaint in the Superior Court of the State of California, in and for the County of San Luis Obispo, has been set down to be tried on the 28th day of January, 1947, before a jury and that these De-

defendants believe it is necessary and proper, if possible to do so, to secure an early trial and judgment in this case determining the rights of the parties hereto.

III.

These Defendants resist the contention that either the United Pacific Insurance Company, a corporation, or the Ohio Casualty Insurance Company, a corporation, are not liable under their respective policies.

Wherefore, these defendants jointly and severally pray that the Court order a speedy hearing of this action and advance it on the calendar as provided in Rule 57, of the Rules of Civil Procedure of the District Courts of the United States; that upon a final hearing, the Court enter a judgment declaring that the policies of insurance issued by the Plaintiff and the Ohio Casualty Insurance Company each apply to and cover the accident mentioned in Plaintiff's Complaint; for such other and further relief both general and specific as to this Honorable Court may seem just, meet and proper.

Dated: December 31st, 1946.

A. H. BRAZIL

Attorney for Defendants, Robert Echols and  
Beverly Echols [25]

[Verified.]

Received copy of the within Answer this 30th day of December, 1946. Parker & Stanbury JCH, Attorneys for .....

Received copy of the within Answer this 30th day of December, 1946. Harry E. Sackett, Attorney for Plaintiff.

[Endorsed]: Filed Feb. 8, 1947. Edmund L. Smith, Clerk. [26]

[LETTER DATED APRIL 16, 1947, to JUDGE  
MATHES FROM PARKER, STANBURY AND  
REESE]

PARKER, STANBURY & REESE

Harry D. Parker	Attorneys at Law
Raymond G. Stanbury	Suite 1217 Foreman Building
White McGee, Jr.	707 South Hill Street
Richard E. Reese	Los Angeles 14
Van A. Hagenbaugh	MIchigan 1207
John Henry Peckham	April 16, 1947

Honorable William C. Mathes, Judge  
United States District Court  
Southern District of California  
Central Division  
Federal Building  
Los Angeles, California

Dear Judge Mathes:

Re: United Pacific Insurance Company,  
a corporation, v. The Ohio Casualty  
Insurance Company, a corporation  
Civil No. 6024-WM

We have been advised by counsel for United Pacific Insurance Company, a corporation, that the above entitled matter has been set down ex parte for hearing before Your Honor on Friday, April 18, 1947, subject to our calendar and to the previous entry by us on behalf of our client, The Ohio Casualty Insurance Company, a cor-



poration, into a stipulation with counsel for the United Pacific Insurance Company, a corporation. We will not be ready for such a hearing in this matter on the date set. We have contacted our client with reference to the proposed stipulation and have been advised by them that we are not authorized to enter into such a stipulation, and they prefer that the matter proceed to a full hearing before Your Honor on the facts in the case.

We are writing this letter at the suggestion of your Clerk, Mr. Somers, to advise Your Honor of the situation. We advised counsel for the United Pacific Insurance Company yesterday upon first learning that the matter had been set for hearing, and are sending to them a copy of this letter.

Yours very truly,

PARKER, STANBURY & REESE

By Raymond G. Stanbury

RAYMOND G. STANBURY

RGS:PM

CC. Messrs. Harry E. Sackett and Raymond G. Brown

[Endorsed]: Filed Apr. 18, 1947. Edmund L. Smith,  
Clerk. [27]

[Title of District Court and Cause]

## ORDER FOR PRE-TRIAL HEARING

Good cause appearing therefor from the proceedings heretofore had herein, upon the Court's own motion it is

Ordered:

(1) That this action be placed on calendar for pre-trial hearing in Court Room No. 2 of this Court at ten o'clock A. M. on May 26, 1947, pursuant to Rule 16 of the Federal Rules of Civil Procedure, and local rules 9, 10 and 11 of this Court; and, unless excused for good cause, each party appearing in the case shall be represented at such pre-trial hearing, and at the meeting or meetings held pursuant to (2) hereof, by the attorney who is to be in charge of the conduct of the trial on behalf of such party;

(2) The attorneys for the parties appearing in the case shall meet at a mutually convenient time and place, not less than ten days in advance of such hearing, and:

(a) exhibit to opposing counsel all documents (other than those to be used for impeachment) intended to be offered at the trial by each party represented;

(b) formulate a concise statement of the facts involved, as claimed by each party, and ascertain which facts are to be admitted by all or any of the parties

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This case will not be called for setting on May 5, 1947, pursuant to local rule 3, but will be set for trial upon conclusion of the pre-trial hearing.

for the purposes of the trial and which facts the respective parties intended to litigate upon the trial; and [28]

(c) ascertain the position of the parties with respect to all other matters referred to in Rule 16 F. R. C. P., which any party desires to have the meeting consider;

(3) Not less than three days in advance of the pre-trial hearing, the attorneys for the parties appearing in the case shall prepare, sign and file with the Clerk, in duplicate and in the form required by local rule 4, a stipulation setting forth:

(a) a concise statement of the facts involved, as claimed by each party, showing which facts will be admitted by all or any of the parties for the purposes of the suit and which facts each party intends to litigate upon the trial;

(b) a list of all documents exhibited by each party at the meeting or meetings held pursuant to (2) above, with a description of each document sufficient for identification and a statement of all admissions by and all issues between any of the parties as to the genuineness thereof, as to due execution thereof, and as to the truth of relevant matters of fact set forth therein;

(c) a brief statement of the position of the parties with respect to all other matters referred to in Rule

16 F. R. C. P., which any party deems applicable to the case; and

(d) any other stipulations or suggestions relative to the case which counsel may desire to incorporate for the assistance of the Court, including the estimate or estimates of counsel as to the probable duration of the trial;

(4) Counsel for each party shall, not less than five days in advance of the pre-trial hearing, serve and file with the Clerk, in duplicate and in the form required by local rule 4, a memorandum containing a brief statement of the points of law, and a citation of the authorities in support of each point, upon which such party intends to rely at the trial;

(5) At the pre-trial hearing each party shall present to the Court all documents (other than those to be used for impeachment) intended to be offered at the trial by such party; and the Court shall thereupon consider:

(a) all stipulations, statements and memoranda filed pursuant to (3) and (4) above; [29]

(b) all documents relied upon by the respective parties;

(c) all matters referred to in Rule 16 F. R. C. P. which may be applicable to the case;

(d) all proceedings then pending under local rule 3 or under Rules 12, 33-37 F. R. C. P.; and

(e) all other questions which may be presented relative to parties, process, pleading or proof, with a view to simplifying the issues and bringing about a just, speedy and inexpensive determination of the action;

(6) Upon completion of the pre-trial hearing, the Court shall set the case for trial and make such order or orders pursuant to Rule 16 F. R. C. P. as the circumstances and status of the case may require;

(7) The memoranda required pursuant to (4) above may be considered as compliance with local rule 12, unless counsel desire to serve and file supplemental memoranda prior to trial.\*

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

Dated: April 26, 1947.

WM. C. MATHES

United States District Judge

\*If trial is to be by jury, the provisions of local rules 13 and 14 shall be followed; and counsel desiring the Court to propound any special questions upon the voir dire examination of prospective jurors shall, not less than two days prior to the trial, serve on opposing counsel and file with the Clerk, in duplicate and in the form required by local rule 4, a request therefor.

[Endorsed]: Filed Apr. 28, 1947. Edmund L. Smith, Clerk. [30]

[Title of District Court and Cause]

## STIPULATION OF FACTS AND ISSUES

It Is Stipulated between the plaintiff United Pacific Insurance Company and the defendants The Ohio Casualty Insurance Company, Robert Echols and Beverly Echols, through their respective counsel, as follows:

### I.

The parties stipulate to the following facts (except where a dispute is noted):

1. (a) That the necessary jurisdictional facts exist in that the plaintiff United Pacific Insurance Company is a corporation organized and domiciled in the State of Washington; that the defendant The Ohio Casualty Insurance Company is a corporation organized and domiciled in the State of Ohio and that the individual defendants are natural persons and citizens of the State of California residing within the Southern District of the United [31] States District Court;

(b) That the amount in controversy exceeds \$3,000.00, excluding interest and costs.

2. (a) That the accident out of which the present insurance coverage controversy arises occurred on January 16, 1946, when a truck owned by George B. Page dba Mission Linen and Towel Supply Company and registered to Mission Linen and Towel Supply Company, which was leased to R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners, and operated by one Floyd Gilbert, an employee of R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners, on business of the latter



and with the permission of the owner, struck a vehicle owned and operated by certain defendants herein, Robert Echols and Beverly Echols;

(b) On September 12, 1946, the said Robert Echols and Beverly Echols filed suit in the Superior Court of the State of California (San Luis Obispo) seeking damages from said accident from the following parties named as defendants: (1) R. H. McKeon and G. B. Page dba under the fictitious name of Pacific Laundry and Dry Cleaners, and (2) G. B. Page dba under the fictitious name of Mission Linen and Towel Supply and (3) Floyd Gilbert;

(c) For the purpose of this action it is stipulated that the said accident was proximately caused by negligence on the part of the said driver, Floyd Gilbert, which is imputed to the other defendants named in said action, and that the said Robert Echols and Beverly Echols are entitled to recover damages in excess of \$3,000.00, exclusive of interest and costs, against any or all of the defendants named in their action. Floyd Gilbert has not been served with process in said action.

3. (a) That on September 18, 1944, the United Pacific Insurance Company issued its policy of automobile liability insurance as shown by Exhibit A attached hereto and that the same was in effect at all material times. That the named assureds therein are: [32]

George B. Paige individually and dba Mission Linen and Towel Supply Company,

H. B. Page individually and dba Model Linen Supply Co.,

George B. Page dba Modern Linen Supply Company;

(b) That the limits of said policy are \$10,000.00 for injury to or death of one person and, subject to that limit for each person, \$25,000.00 for any one occurrence.

4. (a) That on March 24, 1945, the Ohio Casualty Insurance Company issued its policy of automobile liability insurance as attached hereto (Exhibit B) and that the same was effective at all material times. That the named assureds therein are:

R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners, 110 State Street, Santa Barbara, California;

R. H. McKeon and G. B. Page dba Fashion Cleaners, 1041 Sierra Highway, Lancaster, California;

R. H. McKeon and G. B. Page dba Mission Laundry & Cleaners, 222-224 N. Monterey Street, Gilroy, California;

(b) That the said policy issued by The Ohio Casualty Insurance Company also provides, by endorsement effective at all material times, as follows:

"It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; or his liability in connection with other business activities as an individual, a member of other partnerships a receiver, a director, or an executive officer of a corporation."

(c) That the limits of said policy are \$25,000.00 for injury to or death of one person and, subject to that limit for [33] one person, \$50,000.00 for any one accident.

5. That George B. Page and G. B. Page referred to above are the same person. That the said Page, at all material times, conducted various enterprises sometimes as an individual and sometimes in partnership in various parts of California. That McKeon and Page in their various enterprises as named above were copartners. That Pacific Laundry & Dry Cleaners and Mission Linen and Towel Supply Company are not the same enterprises but are operated separately.

6. (a) That the policy issued by United Pacific Insurance Company provides coverage in addition to the named insureds to, inter alios, "(4) any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the named insured . . ." (Exhibit A, line 27 et seq., Definition "Insured" (4));

"Owned Automobile" is defined in said United Pacific Insurance Company policy as follows: "Owned Automobile means an automobile owned in full or in part or registered in the name of the named insured . . ." (Exhibit A, "Definitions", lines 48 to 49.)

(b) That the policy issued by the Ohio Casualty Insurance Company provides coverage, in addition to the named insureds to, inter alios, "with respect to automobiles owned by or registered in the name of the Named Assured . . . any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured." (Exhibit B, "Automobile Extended Coverage".)

The said Ohio Casualty Insurance Company policy further provides in the printed body thereof: "If the Named Assured is a corporation or a co-partnership, the word 'Assured' wherever used in this policy shall include executive officers, directors or co-partners respectively, in their capacities as such."

7. (a) It is stipulated that the driver Floyd Gilbert was [34] a person "using an owned or a hired automobile . . . with the permission of the named insured" within the meaning of the United Pacific Insurance Company policy and that Gilbert was thereby an insured of the United Pacific Insurance Company at the time and place of the accident subject to the limitations contained in the policy.

(b) The parties are unable to stipulate whether Gilbert was likewise an insured of The Ohio Casualty Insurance Company and this is a point in controversy for the Court to decide. (It is contended by the United Pacific Insurance Company that the accident vehicle, being owned by George B. Page, dba Mission Linen and Towel Supply Company, should be considered the same as if owned by or registered to R. H. McKeon and G. B. Page, dba Pacific Laundry & Dry Cleaners so that Gilbert qualified as a person driving a vehicle owned by The Ohio Casualty Insurance Company's named insured. It is contended by The Ohio Casualty Insurance Company that by the terms of its endorsement and within the meaning of the policy, R. H. McKeon and G. B. Page, dba Pacific Laundry & Dry Cleaners is not the same as George B. Page, dba Mission Linen and Towel Supply Company and therefore that Gilbert was not driving a car owned by or registered to the named assured.)

8. That each of said policies (Exhibits A and B) contain Other Insurance Clauses which are as follows:

The United Pacific Insurance Company policy provides as follows:

“Other Insurance—If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability of this policy is in excess of the applicable limit provided by the other insurance available to the insured this policy [35] shall afford excess insurance over and above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy. It is further provided that in respect of loss arising out of the operation, maintenance or use of any non-owned automobile other than a hired automobile, the applicable insurance afforded by this policy shall be excess over and above such other available insurance. Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance which is available to the insured.”

The Ohio Casualty Insurance Company policy provides as follows:

“Other Insurance—If other valid insurance or indemnity exists protecting the Assured or any person or organization entitled to protection hereunder from liability for bodily injury, disease, illness or death, or for damage to property of others, this

policy shall not apply in respect to such specific hazard otherwise covered, whether the Assured is specifically named in such policy or not; provided, however, that if the limits of insurance in this policy are in excess of the limits provided by said other insurance this policy shall provide excess insurance against said hazard in an amount sufficient to give the Assured a combined amount of protection equal to the limits of this policy."

## II.

### ISSUES OF LAW

The issues of law in this proceeding are as follows: [36]

- (a) Does either of the policies of insurance apply to the exclusion of the other?
- (b) Is there double insurance under both policies?

## III.

### CONTENTIONS OF THE PARTIES

The contentions of the plaintiff United Pacific Insurance Company are:

(1) That the substantive law of California applies in this proceeding and that George B. Page, also known as G. B. Page, was a named insured under both policies;

(2) That the accident vehicle was "owned by or registered in the name of the Named Assured" within the meaning of The Ohio Casualty Insurance Company policy and that therefore its policy of insurance covered and applied to said accident including the liability of the driver, Floyd Gilbert;



(3) That since the accident vehicle was being used at the time of the accident in the furtherance of the business of the insured named in The Ohio Casualty Insurance Company policy and by an employee of the insured named in said policy, then the policy of The Ohio Casualty Insurance Company applies to the exclusion of the policy issued by plaintiff;

(4) That should the Court overrule the foregoing points, then in the alternative plaintiff maintains that there is double or concurrent insurance covering the accident and that both companies are liable and should pro-rate the liability including the costs of defense of the action and damages in the State Court and the amount of any judgment or judgments therein in proportion to the limits of liability stated in the respective policies;

(5) That the total amount of insurance available for one person in the damage action is \$35,000.00 because of each occurrence resulting in injuries or death, \$10,000.00 of which is provided by [37] plaintiff and \$25,000.00 of which is provided by The Ohio Casualty Insurance Company;

That therefore United Pacific Insurance Company is liable for 2/7 and the Ohio Casualty Insurance Company for 5/7 of any damages or loss because of injuries to or death of one person.

(b) Contentions of defendant The Ohio Casualty Insurance Company:

(1) That the substantive law of California applies in this proceeding in interpreting the insurance policies and that because of the endorsement of The Ohio Casualty Insurance Company policy excluding all activities of G. B.

Page which are not specified therein, G. B. Page as an individual and dba Mission Linen & Towel Supply Company, was not an assured thereunder, named or otherwise;

(2) That for the foregoing reasons the accident vehicle was not a vehicle "owned by or registered in the name of the Named Assured" (R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners) within the meaning of The Ohio Casualty Insurance Company policy and that the driver Floyd Gilbert was therefore not an assured under that policy.

(3) That since the policy of the United Pacific Insurance Company alone insures Floyd Gilbert, whose liability is primary and ultimate, the policy of the United Pacific Insurance Company applies to the exclusion of the other policy in this proceeding which is designed to avoid further litigation by subrogation, or otherwise; that if liability is imposed upon The Ohio Casualty Insurance Company it will be entitled to recoup its loss from Floyd Gilbert, an assured of the United Pacific Insurance Company, and therefore the liability would ultimately fall on that company.

(4) That if the above points are overruled, the two policies provide concurrent insurance until each of the insurers pays the lower limits, their excess insurance clauses being mutually eliminated and that The Ohio Casualty Insurance Company carries the [38] excess coverage until a total amount equal to its limits is paid.

(5) That the total insurance available is \$25,000/\$50,000 as the Ohio policy provides that in the event of other insurance it will provide the balance up to its stated limits.

(c) Contentions of Robert Echols and Beverly Echols:

(1) That they are entitled to compensation for the injuries sustained by them and to collect the same according to the judgment of this Court.

#### IV.

#### ESTIMATED TIME OF TRIAL

It is estimated that the action can be tried in one day.

HARRY E. SACKETT and  
RAYMOND G. BROWN

Attorneys for Plaintiff United Pacific Insurance  
Company

PARKER, STANBURY & REESE  
RAYMOND G. STANBURY

Attorneys for Defendant The Ohio Casualty  
Insurance Company

A. H. BRAZIL

By Harry E. Sackett

Attorney for Defendants Robert Echols and  
Beverly Echols [39]

EXHIBIT A

Comprehensive Bodily Injury

and Property Damage

Liability Policy

Policy No. CLP 11184

Agent James McCloskey

[Crest]

UNITED PACIFIC INSURANCE COMPANY

Tacoma, Washington

DECLARATIONS

1. The named insured is George B. Page, Individually and dba Mission Linen and Towel Supply Company and H. B. Page, Individually and dba Model Linen Supply Co., and George B. Page dba Modern Linen Supply Company.
2. Post office address of insured 723 E. Montecito St., Santa Barbara, California.
3. The policy period shall be from September 18, 1944 to September 18, 1947 at 12:01 A. M. standard time at the insured's above designated post office address as to each of said dates.
4. Provisional deposit premium payable on effective date is \$609.72, on first anniversary \$609.72 and on second anniversary \$609.72.
5. Policy is subject to Annual audit.
6. Named insured's principal business operations are Laundry, Linen & Towel Supply.

7.

		Limits of Liability			
Description of Coverages		Coverages are “Included” or “Excluded”	Each Person	Each Occurrence	Aggregate
Bodily Injuries Coverages :					
A	(1) Automobiles	Included	\$10,000.	\$25,000.	Not applicable
	(2) Products	Included	\$10,000.	\$25,000.	\$25,000.00
	(3) All other exposures	Included	\$10,000.	\$25,000.	Not applicable
Property Damage Coverages :					
B	Automobiles	Included	Not appli-	\$ 5,000.	Not applicable
C	(1) Products	Excluded	Not applicable	\$ — —	\$ — —
	(2) All other exposures	Excluded	Not applicable	\$ — —	{ \$ — — operations, \$ — — protective, \$ — — contractual

8. Insured's records are kept and may be audited at above post post office address or at No Exceptions.

9. No insurer has canceled or declined any bodily injury or property damage liability insurance for the named insured during the past year, except No Exceptions.

10. The premium for this policy is modified by reason of the insured's having in effect at inception date of this policy the following insurance:

Name of Insurance Carrier	Policy No.	Coverage Afforded	Limits of Liability	Expiring
None				

The terms printed on the back of this page and numbered 1 to 76 inclusive, are hereby made a part hereof, and this page, when countersigned by a duly authorized agent of the company, together with United Pacific In-

insurance Company page of terms numbered 77 to 172 inclusive shall constitute the above numbered policy.

UNITED PACIFIC INSURANCE COMPANY

J W Reynolds President.

Countersigned at Santa Barbara, Calif.

by James M. McCloskey

Authorized Agent. [40]

UNITED PACIFIC Insurance Company

Does Hereby Agree with the named insured, in consideration of the premium, subject to the limits of liability and other terms of this policy:

To Pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability for damages (1) imposed upon him by law or (2) assumed or retained by him under any warranty of goods or products, or under any contract or agreement wholly in writing which liability, without such contract or agreement, would not attach, Because Of—

Coverage A—Bodily Injury, Sickness or Disease, including Death at any time resulting therefrom, sustained by any person or persons;

Coverage B—Injury To or Destruction of Property, including loss of use thereof, arising out of the ownership, maintenance or use of any Automobile;

Coverage C—Injury To or Destruction Of Property Of Others, including loss of use thereof, caused by accident and arising from exposures not described in Coverage B.

\*      \*      \*      \*      \*      \*      \*      \*



(4) any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the named insured, and also any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured.

\* \* \* \* \*

Other Insurance—If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability of this policy is in excess of the applicable limit provided by the other insurance available to the insured this policy shall afford excess insurance over and above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy. It is further provided that in respect of loss arising out of the operation, maintenance or use of any non-owned automobile other than a hired automobile, the applicable insurance afforded by this policy shall be excess over and above such other available insurance. Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance which is available to the insured.

\* \* \* \* \* [41]

## EXHIBIT B

CLP No. 2454    Comprehensive Liability Policy  
(Including Property Damage for Automobiles)

THE OHIO CASUALTY INSURANCE COMPANY  
of Hamilton, Ohio  
(A Stock Company)

## Item

## Declarations

1. Name of Assured R. H. McKeon and G. B. Page  
dba Pacific Laundry & Dry Cleaners
2. Post Office Address 110 State Street, Santa Bar-  
bara, California
3. The Assured is Co-partnership  
(Individual, Co-Partnership, Corporation)
4. Policy Period: From March 24, 1945 to March 24,  
1946 commencing and ending at 12:01 A. M. Stand-  
ard Time at the address of the Named Assured as  
stated herein.
5. Limits of Liability: \$25,000.00 each person;  
\$50,000.00 each occurrence.  
\$ 5,000.00 Automobile Prop-  
erty Damage Liability
6. Nature of Assured's business: Laundry and dry  
cleaning
7. The provisional deposit premium is \$285.19 payable  
\$285.19 in advance and \$..... on 1st anniversary,  
\$..... on 2nd anniversary, subject to the provi-  
sions of Conditions 5 and 6 of this Policy. The sums  
of the Minimum Premiums referred to in Conditions  
5 and 6 of this Policy shall in no event be considered  
as less than \$100.00.

8. No liability insurance has been declined or cancelled by any company during the past three years, except as follows: No exceptions

Countersigned

This 16 day of March 1945. By St. Clair Morton  
Santa Barbara, California [48]

Agent

at

\* \* \* \* \*

AUTOMOBILE EXTENDED COVERAGE

With respect to automobiles owned by or registered in the name of the Named Assured the unqualified word "Assured" wherever used in this policy includes not only the Named Assured but also any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured.

\* \* \* \* \* [49]

3. Subrogation In the event of any payment under this policy the Company shall be subrogated to all the Assured's rights of recovery therefor and the Assured shall execute all papers required and shall do everything that may be necessary to secure such rights.

4. Other Insurance If other valid insurance or indemnity exists protecting the Assured or any person or organization entitled to protection hereunder from liability for bodily injury, disease, illness or death, or for damage to property of others, this policy shall not apply in respect to such specific hazard otherwise covered, whether the Assured is specifically named in such policy or not: provided, however, that if the limits of insurance in this

policy are in excess of the limits provided by said other insurance this policy shall provide excess insurance against said hazard in an amount sufficient to give the Assured a combined amount of protection equal to the limits of this policy.

\*      \*      \*      \*      \*      \*      \*      \*      [50]

## CERTIFICATE OF INSURANCE

### THE OHIO CASUALTY INSURANCE COMPANY HAMILTON, OHIO

Issued to: Camp Cooke Post Exchange

Camp Cooke	California
Street	City                      State

The Ohio Casualty Insurance Company does hereby certify that the following described policy has been issued and is in force at this date.

Policy No. CLP-2454	Policy Period 3-24-45 to 3-24-46
	Inception              Expiration

Issued to R. H. McKeon and G. B. Page dba Pacific  
Laundry and Dry Cleaners, (and Fashion Cleaners)  
(and Mission Laundry & Cleaners)

Post Office Address 110 State St., Santa Barbara, Calif.	
Street	City                      State

#### Coverages and Limits of Liability

Bodily Injury Liability	\$25,000.00	Each Person
	\$50,000.00	Each Accident
Property Damage Liability	\$ 5,000.00	Each Accident

Description of Risk: Coverage applies to all automobiles owned or operated by the insured, and in addition, miscellaneous Bodily Injury Liability exposures, on a Comprehensive Policy form basis.

The Ohio Casualty Insurance Company will not notify the party to whom this certificate is addressed in the event of any change in or the cancellation of the policy, unless this certificate has been modified to provide that such notice is necessary.

State any modification here:

Countersigned at: Santa Barbara, Calif. date 11/21/45

THE OHIO CASUALTY INSURANCE COMPANY

By.....

(Important: Copy of Any Certificate Issued Must Be  
Furnished to the Company) [52]

#3

### GENERAL ENDORSEMENT

It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; or his liability in connection with other business activities as an individual, a member of other partnerships a receiver, a director, or an executive officer of a corporation.

Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the policy other than as above stated.

To be attached to and forming a part of Policy No. CLP 2454 issued to R. H. McKeon, et al. by

THE OHIO CASUALTY INSURANCE CO.

Howard Slamkis

President

This endorsement effective March 24, 1945

St. Clair Morton, Agent [56]

#4

#### GENERAL ENDORSEMENT

It is hereby provided that in the event of any material change in or cancellation of the within numbered policy, notice of such change or cancellation will be given to the Exchange Officer of Camp Cooke of Santa Barbara, California.

Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the policy other than as above stated.

To be attached to and forming a part of Policy No. CLP 2454 issued to R. H. McKeon, et al. by

THE OHIO CASUALTY INSURANCE CO.

Howard Slamkis

President

This endorsement effective March 24, 1945

St. Clair Morton, Agent

[Endorsed]: Filed May 23, 1947. Edmund L. Smith, Clerk. [57]



[Title of District Court and Cause]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above action came on for trial in the above court before the Honorable William C. Mathes, judge presiding, on June 13, 1947, the plaintiff being represented by its attorneys Harry E. Sackett and Raymond G. Brown, the defendant The Ohio Casualty Insurance Company being represented by its attorneys Parker, Stanbury & Reese (Raymond G. Stanbury appearing), the defendants Robert Echols and Beverly Echols having appeared through their attorney A. H. Brazil, and having been legally notified of the time and place of trial but being voluntarily absent, and the other defendants not being present, the foregoing and named parties having filed their written stipulation as to the facts and issues, the plaintiff and the defendant The Ohio Casualty Insurance Company having further stipulated that the Court should determine their [60] respective rights and liabilities as to Floyd Gilbert and should decide whether plaintiff alone, or both of said parties, is or are obligated to provide indemnity for his tort involved herein, and the cause having been argued and continued to July 11, 1947, at which time the appearances of parties and counsel were the same as on June 13, 1947, save that attorney Raymond G. Brown did not appear, the parties having rested, and the Court being fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT

## I.

The Court finds that it is true that the plaintiff is and at all times involved was a corporation organized and existing under the laws of the State of Washington and that it was at all times involved a resident of said state; that the defendant The Ohio Casualty Insurance Company at all times involved is and was a corporation organized and existing under the laws of the State of Ohio and a resident of said state; that each of said corporations was at all times involved lawfully engaged in the transaction of the insurance business; that each and all of the other persons named in the complaint and summons as defendants were at all times involved natural citizens, residents of the State of California, and residing within the Southern District of California.

## II.

The Court finds that there is and at all times involved was a diversity of citizenship among and between the parties and between the plaintiff and each and all of the defendants and that the amount in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs; the Court finds that there is a dispute between the parties presenting a proper case for declaratory relief. [61]

## III.

The Court finds that it is true that George B. Page named as a defendant, and also known as G. B. Page, was at all times involved herein engaged in various business enterprises, sometimes as an individual and sometimes as a co-partner under fictitious names, two of which enterprises were Mission Linen and Towel Supply

Company and Pacific Laundry & Dry Cleaners; the Court finds that it is true that the said George B. Page (sometimes known as G. B. Page) and R. H. McKeon were at all times involved herein co-partners in the conduct of a business enterprise known as Pacific Laundry & Dry Cleaners; that it is true that the said George B. Page at all times involved herein conducted a business individually under the fictitious name of Mission Linen and Towel Supply Company; that the said George B. Page at all times involved herein also did business as an individual under the fictitious name of Modern Linen Supply Company; that it is true that at all times involved herein the said R. H. McKeon and the said G. B. Page as co-partners conducted other business enterprises under the fictitious names of Fashion Cleaners and Mission Laundry and Cleaners; that it is true that the said George B. Page was at all times involved herein also engaged in other activities as an individual; that Pacific Laundry & Dry Cleaners and Mission Linen and Towel Supply Company are not and never have been the same enterprises but are and always have been operated separately.

#### IV.

The Court finds that it is true that on or about September 18, 1944, for a valuable consideration, plaintiff, United Pacific Insurance Company, issued to the said George B. Page, individually and doing business as Mission Linen and Towel Supply Company, and H. B. Page, individually and doing business as Model Linen Supply Company, and George B. Page, doing business as Modern Linen Supply Company, a policy of automobile liability insurance exactly as shown [62] in Exhibit A attached to the complaint which exhibit is incorporated

herein by reference, together with the endorsements attached thereto, and all of which the Court finds constitutes the contract of the said parties, insurer and insureds; that the said policy was in effect at all times herein involved.

## V.

The Court finds that the aforesaid policy issued by plaintiff United Pacific Insurance Company provides coverage, in addition to the named insureds to, inter alios, "(4) any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the named assured . . ."; the Court finds that "Owned Automobile" is defined in the said policy as follows: "Owned Automobile" means an automobile owned in full or in part or registered in the name of the named insured . . ."

## VI.

The Court finds that it is true that the defendants The Ohio Casualty Insurance Company, on March 24, 1945, for a valuable consideration, issued a policy of automobile liability insurance to the said R. H. McKeon and G. B. Page, doing business under the following fictitious names: Pacific Laundry & Dry Cleaners, Fashion Cleaners, and Mission Laundry & Cleaners; that said policy was exactly as shown in Exhibit A attached to the answer of said defendant The Ohio Casualty Insurance Company, together with all endorsements attached thereto, which policy and endorsements are hereby incorporated by reference and found to constitute the contract of the parties; that said contract was in full force and effect at all times involved herein.

## VII.

The Court finds that the said policy issued by the defendant The Ohio Casualty Insurance Company provided, by typed endorsement effective at all times involved herein, as follows: "It [63] is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; or his liability in connection with other business activities as an individual, a member of other partnerships, a receiver, a director or an executive officer of a corporation." The Court finds that it was the intention of R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners, and of the defendant The Ohio Casualty Insurance Company, in procuring the aforesaid policy (Exhibit A of answer of said Company, incorporated herein by reference) to recognize the various partnerships of R. H. McKeon and G. B. Page insured by said policy, including the partnership conducted under the fictitious name of Pacific Laundry & Dry Cleaners as separate entities and to differentiate the activities of G. B. Page as a partner of R. H. McKeon in the enterprises named in said policy from the activities of the said G. B. Page (also known as George B. Page) individually or in connection with any unspecified activity, all in accordance with the endorsement set forth in this paragraph.

## VIII.

The Court finds that the said policy of the defendant The Ohio Casualty Insurance Company also provides, and has at all times involved herein provided, coverage to the following persons, *inter alios*, in addition to the



named assureds: "with respect to automobiles owned by or registered in the name of the Named Assured . . . any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured."

### IX.

The Court finds that it is true that prior to January 16, 1946, George B. Page, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company leased or [64] rented to R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry & Dry Cleaners for the use of the latter in the conduct of their business under such name, and for a valuable consideration, a certain truck referred to hereinafter as the truck.

### X.

The Court finds that it is true that on January 16, 1946, the said truck was involved in a collision with a vehicle occupied by the defendants Robert Echols and Beverly Echols and that as a proximate result thereof the said Robert Echols and Beverly Echols sustained personal injuries and incurred losses in excess of \$3,000.00 in value, exclusive of costs and interest.

### XI.

The Court finds that it is true that at the time of said accident the said truck was being driven by one Floyd Gilbert named as a defendant herein; that the said Floyd Gilbert was acting as servant and employee of R. H. McKeon and G. B. Page doing business as Pacific Laundry & Dry Cleaners; that the said Floyd Gilbert was



acting in the scope of his said employment; that at said time the said truck was owned by George B. Page doing business as Mission Linen and Towel Supply Company; that the said Floyd Gilbert at the time of said accident operated the said truck with the knowledge, permission and consent of the owner thereof, George B. Page, doing business as Mission Linen and Towel Supply Company.

## XII.

The Court finds that it is true that the said accident and all injuries, damages and losses incurred by the said Robert Echols and Beverly Echols and each of them were solely and proximately caused by negligence on the part of the said Floyd Gilbert in the operation of the said truck.

## XIII.

The Court finds that it is true that on September 12, [65] 1946, the said Robert Echols and Beverly Echols filed suit in the Superior Court of the State of California in and for the County of San Luis Obispo seeking damages in excess of \$3,000.00 exclusive of interest and costs, and arising from the aforesaid negligence and accident, from the following parties who were and are named as defendants in said action:

- (1) R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry and Dry Cleaners, and
- (2) G. B. Page doing business under the fictitious name of Mission Linen and Towel Supply, and
- (3) Floyd Gilbert;

that it is true that the said Robert Echols and Beverly Echols are entitled to recover damages in excess of

\$3,000.00, exclusive of interest and costs, against the defendants named in (1) and (2) of this paragraph solely through the imputation to them of the negligence of Floyd Gilbert by operation of law.

#### XIV

The Court finds that the policy of insurance issued by the plaintiff United Pacific Insurance Company attaches to and covers the liability of George B. Page doing business as Mission Linen and Towel Supply and the liability of the said Floyd Gilbert in connection with the aforesaid accident and applies to and covers, up to the limits of said policy, among other things, all injuries, damages and losses sustained by Robert Echols and Beverly Echols and each of them; the Court finds that the policy of the defendant The Ohio Casualty Insurance Company attaches to and covers the liability of R. H. McKeon and G. B. Page doing business as Pacific Laundry & Dry Cleaners, and that it attaches to the liability of the last named parties to the said Robert Echols and Beverly Echols and each of them arising out of the said accident, up to the limits of said policy. [66]

#### XV.

The Court finds that the policy of the said defendant The Ohio Casualty Insurance Company does not cover or attach to the liability of the said Floyd Gilbert; that the said Floyd Gilbert at the time of said accident was not operating a vehicle owned by or registered in the name of any Named Assured or person insured in or by the said policy of the Ohio Casualty Insurance Company.

XVI.

The Court finds that the policy of the said defendant The Ohio Casualty Insurance Company does not cover or attach to the liability of George B. Page individually or doing business as Mission Linen and Towel Supply Company; that the truck involved in said accident was not a vehicle owned by or registered in the name of any Named Assured or person insured in or by the said policy of The Ohio Casualty Insurance Company.

XVII.

The Court finds that at the time of the aforesaid accident the said Floyd Gilbert was operating and using an automobile owned by George B. Page individually and doing business as Mission Linen and Towel Supply Company, a named assured under the aforesaid policy of the plaintiff United Pacific Insurance Company; that the said Floyd Gilbert was therefore an assured of the said United Pacific Insurance Company at the time of said accident within the meaning of the said insurance policy of said plaintiff.

XVIII.

The Court finds that at the time of the aforesaid accident R. H. McKeon and G. B. Page doing business as Pacific Laundry & Dry Cleaners were, through the aforesaid Floyd Gilbert and as his employers, persons legally responsible for the use of a vehicle owned by a named assured of the plaintiff United Pacific Insurance Company's policy, within the clause set forth in paragraph V of these findings, and with the permission of said named assured; the Court finds therefore that the said R. H. McKeon and G. B. Page [67] doing business as Pacific

Laundry & Dry Cleaners were at the time of said accident assureds under the policy of said plaintiff and covered and indemnified thereunder as well as under the policy of the defendant The Ohio Casualty Insurance Company.

### XIX.

The Court finds that at the time of said accident George B. Page individually or doing business as Mission Linen and Towel Supply Company was not a person operating or using a vehicle owned by or registered in the name of the Named Assured in the policy of the defendant The Ohio Casualty Insurance Company and that therefore the said George B. Page individually or doing business as Mission Linen and Towel Supply Company is not insured by or indemnified by the policy of the defendant The Ohio Casualty Insurance Company.

### XX.

The Court finds that George B. Page acting individually and doing business as Mission Linen and Towel Supply Company at all times acted in a different capacity from G. B. Page as a partner of R. H. McKeon doing business as Pacific Laundry & Dry Cleaners and at all such times acted outside the coverage of the policy of the defendant The Ohio Casualty Insurance Company; the Court finds that the renting or leasing of the truck by George B. Page doing business as Mission Linen and Towel Supply Company to R. H. McKeon and G. B. Page doing business as Pacific Laundry & Dry Cleaners as set forth in paragraph IX of these Findings and the ownership of said truck by George B. Page individually and doing business under the fictitious name of Mission Linen and Towel Supply Company, and the registration

of said truck to Mission Linen and Towel Supply Company (as set forth in paragraph XI of these Findings) were activities and functions of the said G. B. Page, also known as George B. Page, in capacities other than as partner of R. H. McKeon in any partnership which was an insured under the policy of The Ohio Casualty Insurance Company. [68]

## XXI.

The Court finds that the endorsements included as part of the policy of The Ohio Casualty Insurance Company issued to Camp Cooke Post Exchange, Camp Cooke, California, and each of them, were issued for the protection of the said Camp Cooke Post Exchange in connection with activities of the assureds conducted on behalf of Camp Cooke Post Exchange and that said endorsements did not otherwise affect or modify said policy and were not intended so to do; the Court finds that at the time of the accident in question the truck was not being operated on behalf of Camp Cooke Post Exchange.

## XXII.

The Court finds that Mission Linen and Towel Supply Company is and at all times involved herein has been the same as Mission Linen & Towel Supply Company and that Pacific Laundry and Dry Cleaners is and at all times involved herein has been the same as Pacific Laundry & Dry Cleaners and that the said appellations have been used by the insurance company parties hereto interchangeably.

## CONCLUSIONS OF LAW

From the foregoing findings of fact the Court makes the following conclusions of law:

## I.

That the plaintiff United Pacific Insurance Company is obligated under its contract of insurance to provide a defense of its assureds George B. Page individually and doing business as Mission Linen and Towel Supply Company and Floyd Gilbert in the action "Robert Echols and Beverly Echols vs. R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry & Dry Cleaners and G. B. Page doing business individually under the fictitious name of Mission Linen and Towel Supply and [69] Floyd Gilbert," which action is pending in the Superior Court of the State of California, in and for the County of San Luis Obispo; that the said plaintiff is obligated under its said contract of insurance and within the limits thereof to respond to and satisfy any judgment which may be rendered against its said assureds or either of them in said action.

## II.

That the defendant The Ohio Casualty Insurance Company is obligated under its contract of insurance to provide a defense in the aforesaid action for its assureds R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry and Dry Cleaners and, within the limits of said policy, and subject to the provisions of paragraph III of these conclusions of law, to respond to and to pay any judgment which may be rendered in the said action against its assureds R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry and Dry Cleaners.



### III.

That the plaintiff United Pacific Insurance Company and the defendant The Ohio Casualty Insurance Company are jointly obligated to respond to and satisfy any judgment for death or injury rendered in said San Luis Obispo action against R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners as follows:

(a) Equally and co-extensively, dollar for dollar, until said judgment or judgments are satisfied or until plaintiff's policy limits (of \$10,000.00 for injury to or death of one person and \$25,000.00 for the entire accident) are exhausted, whichever sum is smallest, and

(b) The satisfaction of the balance if any of any judgment in excess of \$20,000.00 (twice plaintiff's limit) for death of or injury to any one person and \$50,000.00 for the entire accident [70] shall be the obligation of the defendant, The Ohio Casualty Insurance Company.

### IV.

That the plaintiff United Pacific Insurance Company and the defendant The Ohio Casualty Insurance Company are obligated to respond to and satisfy any judgment for property damage which may be rendered in said San Luis Obispo action against R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners equally and co-extensively, dollar for dollar, until said judgment or judgments are satisfied or until the combined payments of said parties equal the sum of \$10,000.00 (twice the \$5,000.00 limit of each policy) whichever is the smaller sum.

## V.

That the rights and obligations of the parties hereto are and shall be the same as herein set forth with respect to any other action which may hereafter be brought by Robert Echols or Beverly Echols seeking damages arising from the negligence of Floyd Gilbert in the operation of the said truck at the time and place of said accident.

## VI.

That the plaintiff United Pacific Insurance Company insures the liability of Floyd Gilbert in connection with the said accident of January 16, 1946, and is obligated, within the limits of its policy, to respond to and satisfy any judgment which may be rendered against Floyd Gilbert in connection with the said accident. Said plaintiff United Pacific Insurance Company is also obligated, within the limits of its policy, to reimburse defendant The Ohio Casualty Insurance Company for all expenditures, reasonably and necessarily made, or to be made by it, to or on behalf of Robert Echols or Beverly Echols: (1) in satisfaction, in whole or in part, of any judgment which may be recovered by Robert Echols or Beverly Echols in the aforesaid San Luis Obispo action or [71] (2) in compromise settlement, in whole or in part, of the claims of Robert Echols or Beverly Echols arising from said accident of January 16, 1946.

July 31, 1947.

WM. C. MATHES

Judge

[Endorsed]: Filed Jul. 31, 1947. Edmund L. Smith,  
Clerk. [72]

In the District Court of the United States  
Southern District of California  
Central Division

No. 6024-WM

UNITED PACIFIC INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

THE OHIO CASUALTY INSURANCE COMPANY,  
a corporation, et al.,

Defendants.

### JUDGMENT

The above action came on for trial in the above court before the Honorable William C. Mathes, judge presiding, on June 13, 1947, the plaintiff being represented by its attorneys Harry E. Sackett and Raymond G. Brown, the defendant The Ohio Casualty Insurance Company being represented by its attorneys, Parker, Stanbury & Reese (Raymond G. Stanbury appearing), the defendants Robert Echols and Beverly Echols having appeared through their attorney A. H. Brazil, and having been legally notified of the time and place of trial but being voluntarily absent, and the other defendants not being present, the foregoing and named parties having filed their written stipulation as to the facts and issues, the plaintiff and the defendant The Ohio Casualty Insurance Company having further stipulated that the Court should determine their respective rights and liabilities as to Floyd Gilbert and should [73] decide whether plaintiff alone, or both of said parties, is or are obligated to provide indemnity for his tort involved herein, and the cause having been argued

and continued to July 11, 1947, at which time the appearances of parties and counsel were the same as on June 13, 1947, save that attorney Raymond G. Brown did not appear, the parties having rested, and the Court being fully advised in the premises, and having made its Findings of Fact and Conclusions of Law,

It Is Hereby Adjudged and Decreed that the rights, duties and obligations of the parties hereto are as follows:

### I.

That the plaintiff United Pacific Insurance Company is obligated under its contract of insurance to provide a defense of its assureds George B. Page individually and doing business as Mission Linen and Towel Supply Company and Floyd Gilbert in the action "Robert Echols and Beverly Echols vs. R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry & Dry Cleaners and G. B. Page doing business individually under the fictitious name of Mission Linen and Towel Supply and Floyd Gilbert," which action is pending in the Superior Court of the State of California in and for the County of San Luis Obispo; that the said plaintiff is obligated under its said contract of insurance and within the limits thereof to respond to and satisfy any judgment which may be rendered against its said assureds or either of them in said action.

### II.

That the defendant The Ohio Casualty Insurance Company is obligated under its contract of insurance to provide a defense in the aforesaid action for its assureds R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry and Dry Cleaners and,

within the limits of said policy, and subject to the provisions of paragraph III of this judgment, to [74] respond to and to pay any judgment which may be rendered in the said action against its assureds R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry and Dry Cleaners.

### III.

That the plaintiff United Pacific Insurance Company and the defendant The Ohio Casualty Insurance Company are jointly obligated to respond to and satisfy any judgment for death or injury rendered in said San Luis Obispo action against R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners as follows:

(a) Equally and co-extensively, dollar for dollar, until said judgment or judgments are satisfied or until plaintiff's policy limits (of \$10,000.00 for injury to or death of one person and \$25,000.00 for the entire accident) are exhausted, whichever sum is smaller, and

(b) The satisfaction of the balance, if any, of any judgment in excess of \$20,000.00 (twice plaintiff's limit) for death of or injury to any one person and \$50,000.00 for the entire accident shall be the obligation of the defendant The Ohio Casualty Insurance Company.

### IV.

That the plaintiff United Pacific Insurance Company and the defendant The Ohio Casualty Insurance Company are obligated to respond to and satisfy any judgment for property damage which may be rendered in said San Luis Obispo action against R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners, equally and co-extensively, dollar for dollar, until said

judgment or judgments are satisfied or until the combined payments of said parties equal the sum of \$10,000.00 (twice the \$5,000.00 limit of each policy) whichever is the smaller sum. [75]

#### V.

That the rights and obligations of the parties hereto are and shall be the same as herein set forth with respect to any other action which may hereafter be brought by Robert Echols or Beverly Echols seeking damages arising from the negligence of Floyd Gilbert in the operation of the said truck at the time and place of said accident.

#### VI.

That the plaintiff United Pacific Insurance Company insures the liability of Floyd Gilbert in connection with the said accident of January 16, 1946, and is obligated, within the limits of its policy, to respond to and satisfy any judgment which may be rendered against Floyd Gilbert in connection with the said accident. Said plaintiff United Pacific Insurance Company is also obligated, within the limits of its policy, to reimburse defendant The Ohio Casualty Insurance Company for all expenditures, reasonably and necessarily made, or to be made by it, to or on behalf of Robert Echols or Beverly Echols: (1) in satisfaction, in whole or in part, of any judgment which may be recovered by Robert Echols or Beverly Echols in the aforesaid San Luis Obispo action or (2) in compromise settlement, in whole or in part, of the claims of Robert Echols or Beverly Echols arising from said accident of January 16, 1946.

#### VII.

The parties United Pacific Insurance Company and The Ohio Casualty Insurance Company, and each of them,



are hereby severally directed to perform the obligations declared in this judgment, all in accordance with the foregoing declaration and as the same may arise.

July 31, 1947.

WM. C. MATHES

Judge

Judgment entered Jul. 31, 1947. Docketed Jul. 31, 1947. C. O. Book 44, page 491. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy. [76]

Received copy of the within Judgment this 30 day of July, 1947. Harry E. Sackett, B/W, Attorney for Plaintiff.

[Endorsed]: Filed Jul. 31, 1947. Edmund L. Smith, Clerk. [77]

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[Title of District Court and Cause]

## NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that United Pacific Insurance Company, a corporation, the Plaintiff above named, hereby appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit from the final judgment and the whole thereof, which was entered in this action on the 31st day of July, 1947.

HARRY E. SACKETT

Attorney for Plaintiff

RAYMOND G. BROWN

Attorney for Plaintiff

[Endorsed]: Filed & mld. copies to Parker, Stanbury & Reese and A. H. Brazil, Oct. 24, 1947. Edmund L. Smith, Clerk. [78]

GENERAL CASUALTY COMPANY OF AMERICA  
Copy                      Seattle, Washington

Bond No. 126,013

Premium: \$10.00

In the United States District Court  
Southern District of California  
Central Division

Civil No. 6024 WM

UNITED PACIFIC INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

THE OHIO CASUALTY INSURANCE COMPANY,  
a corporation; R. H. McKEON, Individually;  
GEORGE B. PAGE, Individually; R. H. McKEON  
and G. B. PAGE, d/b/a under the fictitious name of  
PACIFIC LAUNDRY AND DRY CLEANERS;  
GEORGE B. PAGE, Individually and d/b/a under  
the fictitious name of MISSION LINEN AND  
TOWEL SUPPLY COMPANY,

Defendants.

COST BOND ON APPEAL

Whereas, judgment was entered in a civil action tried before the Hon. William C. Mathes, a judge in and for the above entitled court, and judgment having been rendered on the 31st day of July, 1947, declaring the rights, legal relations and status of plaintiff, United Pacific In-

insurance Company, a corporation, and defendant, The Ohio Casualty Insurance Company, a corporation, and

Whereas, United Pacific Insurance Company, a corporation, plaintiff has filed Notice of Appeal from the said judgment to the United States Circuit Court of Appeals for the Ninth Circuit,

Now, Therefore, United Pacific Insurance Company, a corporation, plaintiff as principal, and General Casualty Company of America, a corporation organized and existing under the laws of the State of Washington, with its principal office in the City of Seattle and authorized to transact surety business in the State of California pursuant to the Act of Congress of August 18, 1934, entitled "An Act relative to recognizance, stipulation, bonds and undertakings and to allow certain corporations to be accepted as surety thereunder," as Surety, are held and firmly bound and undertake that said appellant will pay all costs and disbursements which may be awarded against it on said appeal and that said appellant will satisfy any judgment for costs which may be given against it in the Appellate Court on Appeal not to exceed, however, the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars.

Signed, Sealed and Dated this 23rd day of October, 1947.

UNITED PACIFIC INSURANCE COMPANY,  
a corporation,

Appellant

By Harry E. Sackett  
Raymond G. Brown

Its Attorneys

(Seal)

GENERAL CASUALTY COMPANY OF  
AMERICA

By J. J. McHugh

Attorney-in-Fact

State of California

County of Los Angeles—ss.

On this 23rd day of October, A. D., 1947, before me, M. M. Jackson, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared J. J. McHugh, Attorney-in-Fact of the General Casualty Company of America, to me personally known to be the individual and officer described in and who executed the within instrument, and he acknowledged the same, and being by me duly sworn, deposes and says that he is the said officer of the Company aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles, County of Los Angeles, the day and year first above written.

(Seal)

M. M. JACKSON

Notary Public in and for the County of Los Angeles,  
State of California

My Commission Expires May 1, 1951.

[Endorsed]: Filed Oct. 24, 1947. Edmund L. Smith,  
Clerk. [79]

[Title of District Court and Cause]

STATEMENT OF POINTS ON WHICH  
APPELLANT WILL RELY ON APPEAL

Plaintiff having lately filed its Notice of Appeal from the judgment of this Court to the Circuit Court of Appeals for the Ninth Circuit, and having designated portions of the record herein to be contained in the Record on Appeal, does hereby file its statement of the points on which it intends to rely upon appeal.

1. That the District Court erred in not following the rule of *Erie Railroad Company vs. Tompkins*, 304 U. S. 64, in that it failed to follow and apply the law of California in deciding the case.

2. The District Court erred in deciding that Defendant, The Ohio Casualty Insurance Company, was entitled to subrogate and recoup its loss against [80] the driver of the accident vehicle, Floyd Gilbert, based on the remote possibility that said Floyd Gilbert might at some future time be served with Summons in an action for damages arising out of the same transaction, and judgment had against him as the negligent servant of his employers.

3. Having undertaken to declare the rights, legal relations and status of the parties based upon such remote contingency, the District Court erred in not deciding that Floyd Gilbert was an insured within the meaning of the policy of insurance issued by The Ohio Casualty Insurance Company.

4. Having decided that there was double insurance, the District Court erred in not holding that The Ohio Casualty Insurance Company should pay 5/7 and United Pacific Insurance Company 2/7 of the liability or loss.

5. That the District Court erred in deciding that Plaintiff, United Pacific Insurance Company was obligated to respond to and satisfy any judgment which might be recovered against Floyd Gilbert in connection with the accident giving rise to the litigation.

6. The District Court erred in deciding that United Pacific Insurance Company is obligated to reimburse the Ohio Casualty Insurance Company for all expenditures reasonably and necessarily made or to be made by it, to or on behalf of Robert Echols or Beverly Echols; (1) in satisfaction, in whole or in part, of any judgment which might be recovered by Robert Echols and Beverly Echols in the aforesaid controversy.

7. That the Court erred in entering and rendering judgment on July 31, 1947.

HARRY E. SACKETT

Attorney for Pltf. and Appellant, United  
Pacific Ins. Co.

RAYMOND G. BROWN

Attorney for Pltf. and Appellant, United  
Pacific Ins. Co. [81]

Received copy of the within this 5th day of Nov., 1947. Parker, Stanbury & Reese, T, Attorney for Deft.

[Endorsed]: Filed Nov. 5, 1947. Edmund L. Smith, Clerk. [82]



[DOCKET ENTRIES]

6024-WM Docket

Title of Case

United Pacific Insurance Co., a corp., vs. The Ohio Casualty Ins. Co., a corp., R. H. McKeon, individually; George B. Page, R. H. McKeon and G. B. Page, dba Pacific Laundry and Dry Cleaners; George P. Page dba Mission Linen and Towel Supply Co.; Floyd Gilbert, Robert Echols, Beverly Echols.

Attorneys

For Plaintiff: Harry E. Sackett.

For Defendant Ohio Cas. Ins. Co.: Parker, Stanbury & Reese; A. H. Brazil for Echols.

Declaratory jmt.

Date	Plaintiff's Account	Received	Disbursed
11/26/46	Harry E. Sackett	15 00	
1-14-47	Treas T 3		15 00
<hr/>			
10-24-47	United Pac. Ins. Co.	5 00	[86]

Date Filings—Proceedings

11/26/46	Fld complaint for declaratory jmt. Issd sum. Made Report J. S. 5. Clerk's Fees Plaintiff 15 —
12/16/46	Fld sep answer of deft Ohio Casualty Ins. Co. Amount Reported in Emoulment Returns 15 —

- 1 /3/47    Fld not of mot of plf to adv cause for hrg,  
              ret 1/13/47.    Fld mot of plf to advance  
              cause for hrg, with affid H. E. Sackett in  
              suppt.
- 1/ 3/47    Fld sum ret part served.
- 1/13/47    Ent ord mo to advance cause for hrg go off  
              calendar.
- 2/ 8/47    Fld answer of deft Robert Echols and Bev-  
              erly Echols.
- 4/14/47    Ent ord settg for trial 4/18/47 at 10 AM.
- 4/18/47    Fld letter of 4/16/47 of Parker, Stanbury &  
              Reese to Jdge Mathes.    Ent ord settg for  
              pretrial hrg & settg on 5/26/47.
- 5/19/47    Fld appln of Raymond G. Brown, non-res  
              atty to appear in case.    Fld ord permittg  
              Raymond G. Brown, non-res atty to appear  
              in trial.
- 5/23/47    Fld stip of facts & issues.    Fld pretrial brief  
              of plf.  
              Fld pretrial memo of the Ohio Casualty Ins  
              Co.
- 5/26/47    Ent ord settg for trial 6/13/47 at 10 AM.
- 6/11/47    Fld defts supplmntl pre-trial memo.
- 6/13/47    Ent proc on trial.    Fld 1 plf ex.    Ent proc on  
              arg.
- Ent ord cont 7/11/47 for fur trial at 1:30.

- 7/11/47 Court finds with respect to the accident of 1/16/46 the policies of both pltf and deft cover, and both are bound to respond according to their policies. Counsel for deft to prepare formal order pur rule 7 in 5 days.
- 7/28/47 Counsel discuss findings and will resubmit them 7/30/47.
- 7/31/47 Fld findings of Fact and Conclusions of Law. Fld & entered judgt declaring rights and obligations of the parties, at Cob 44/491. D&I Judgt. Notified attys. Made Report J. S. 6.
- 8/ 6/47 Fld not of entry of jmt. [87]
- 10/14/47 Fld rptrs trans of proceedgs.
- 10/24/47 Fld Not of Appeal, of pltf and mald copies to Parker, Stanbury & Reese, attys for Ohio Cas. Ins. Co. and A. H. Brazil, atty for Robert and Beverly Echols. Fld. Cost bond on appeal in the amt of \$250.00. Clerk's Fees Plaintiff 5 -
- 11/ 5/47 Fld plfs desig of contents of record on appeal. Fld. plfs stmt of points on which appellant will rely on appeal.
- 11/ 6/47 Fld in dup copies rptrs trans dtd 7/11/47; 6/13-7/28/47. [88]

[Title of District Court and Cause]

## CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 88, inclusive, contain full, true and correct copies of Complaint for Declaratory Judgment together with a portion of Exhibit A thereto; Separate Answer of Defendant The Ohio Casualty Insurance Company together with a portion of Exhibit A thereto; Summons with return of Marshal re service of defendant Floyd Robert Gilbert; Answer of Defendants Robert Echols et al.; Letter dated April 6, 1947 from Parker, Stanbury & Reese to Honorable William C. Mathes, Judge; Order for Pre-Trial Hearing; Stipulation of Facts and Issues; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Cost Bond on Appeal; Statement of Points on Which Appellant Will Rely on Appeal; Designation of Contents of Record on Appeal and Docket Entries which, together with copy of Reporter's Transcript of Proceedings on June 13, 1947, July 11, 1947 and July 28, 1947 and Original Plaintiff's Exhibit 1, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$22.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 26 day of November, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable William C. Mathes, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Friday, June 13, 1947

Appearances:

For the Plaintiff: Harry E. Sackett, Esq., and Raymond G. Brown, Esq.

For the Defendant Ohio Casualty Co.: Parker, Stanbury & Reese, by Raymond G. Stanbury, Esq.

For the Defendants Echols: A. H. Brazil, Esq.

Los Angeles, California, Friday, June 13, 1947

10:00 A. M.

The Court: Is there evidence to be offered, gentlemen?

Mr. Stanbury: Your Honor, I have been requested to make a stipulation by counsel for the plaintiff and I am ready to do so. Your Honor may remember the discussion of this at the time of the pre-trial hearing. We deny that this has any materiality, but they are the facts, and therefore we are offering the stipulation.

The stipulation is that the defendant's assured Pacific Laundry and Dry Cleaners had rented this truck for a period of one year from the United's insured; that Ohio's assured had paid rental on it throughout that period and that the truck bore the legend "Pacific Cleaners" as shown in this photograph which we offer in duplicate, if your Honor cares to see the photograph.

The Court: Do you join in that stipulation?

Mr. Sackett: We join in it, your Honor.

Mr. Stanbury: As to when that "Pacific Cleaners" was put on the truck neither side are able to ascertain.

The Court: But it was during the life of both policies, was it?

Mr. Stanbury: Well, sir, we do not know whether it was done before Pacific Laundry and Dry Cleaners took possession of it or afterwards. It would probably be an inference that it was afterwards. The name is "Pacific Cleaners" and I do [3\*] not even know whether that is the name of some previous activity or what it is.

The Clerk: The photographs will be marked Plaintiff's Exhibit 1.

Mr. Stanbury: Yes, sir.

The Court: Both photographs received into evidence as Plaintiff's Exhibit 1 pursuant to the stipulation.

Is there any further evidence to be offered?

Mr. Stanbury: No, sir.

Mr. Sackett: That is all we have, your Honor.

The Court: Then it is submitted upon the facts as now stipulated?

Mr. Stanbury: Yes, sir.

The Court: That is, the written stipulation plus the stipulation made here this morning, is that correct?

Mr. Stanbury: Yes, sir.

The Court: I will hear from the plaintiff.

Mr. Brown: If the court please, and counsel:

This is a controversy between the two insurance carriers, United Pacific Insurance Company of Tacoma, Washington, and Ohio Casualty Insurance Company of Hamilton, Ohio. The other parties to this proceeding are merely standing by awaiting the outcome of this controversy.

To begin at the beginning, on the 16th day of January, 1946, Mr. Robert Echols and his son, Beverly Echols, were [4] driving their automobile on the highway, I

\*Page number appearing at top of page of original Reporter's Transcript.



believe in San Luis Obispo County at that time, and approaching from the opposite direction one Floyd Gilbert was driving the truck shown in the photograph just handed to your Honor. The truck was operating from the opposite direction and, as we understand the facts, got on the wrong side of the highway and collided practically head-on with Mr. Echols and his son.

The Court: In any event it is stipulated that the negligence of the driver Gilbert was the proximate cause of the injuries?

Mr. Brown: It is so stipulated.

The Court: And that the Echols, that is, Robert and Beverly Echols, together are entitled to recover by reason thereof in excess of \$3,000.

Mr. Brown: It is so stipulated.

The Court: In the San Luis Obispo Superior Court action.

Mr. Brown: Yes, sir. They have filed their action there and, as parties defendant in that action or claim, R. H. McKeon and G. B. Page—this is from page 2 of the stipulation—dba under the fictitious name of Pacific Laundry and Dry Cleaners, and also G. B. Page dba under the fictitious name of Mission Laundry and Towel Supply Company.

The Court: Mission Linen.

Mr. Brown: I am sorry, your Honor. Mission Linen and [5] Supply Company, and Floyd Gilbert who was the driver.

The Court: The vehicle was registered in the name of G. B. Page doing business under the fictitious name of Mission Linen and Towel Supply?

Mr. Brown: That is correct.

The Court: That is, registered with the California Motor Vehicle Department?

Mr. Brown: That is correct, your Honor.

In the action in San Luis Obispo County Floyd Gilbert has never been served with summons. That is also stipulated.

Floyd Gilbert was named as a party in this proceeding, but examination of the Return of the Marshal shows that he was not served in this proceeding. The only information I have on the subject that I consider entirely reliable is that contained on the Return of the Marshal to the effect that he is no longer in the State of California.

The Court: Does the plaintiff now dismiss as to the defendants not served?

Mr. Brown: Yes.

The Court: That would be Floyd Gilbert, alone, as I understand it?

Mr. Brown: Yes; we are quite willing, and will move the court for an order dismissing Floyd Gilbert.

The Court: From this action?

Mr. Brown: From this action. [6]

The Court: The motion is granted.

Mr. Brown: Now coming to the two policies giving rise to the controversy, they are attached to the stipulation. The Ohio Casualty policy is marked Exhibit B, the United Pacific policy, marked Exhibit A.

In point of time the United Pacific policy was first issued. The policies contain all material endorsements that we were able to find.

There is practically no controversy over the construction and meaning of the United Pacific policy.

The Court: Let me ask you there: The United Pacific policy was issued to G. B. Page, individually, and

doing business as Mission Linen and Towel Supply, was it not?

Mr. Brown: That is correct, your Honor.

The Court: Then there can be no question, I take it, that Gilbert was driving the truck and the McKeon and Page concern, which was that Pacific Laundry—

Mr. Brown: Pacific Laundry and Dry Cleaners.

The Court: Pacific Laundry and Dry Cleaners was using the truck with the permission of Page. There is no question about that, is there?

Mr. Brown: There is no question about the fact. There is a question about the effect of that fact.

The Court: Now, let us get to that and see what that question is. [7]

So we have Page, the owner—from one side of it, we have Page, the owner of the vehicle, permitting—before I proceed with that, I take it there is no question of exceptions by reason of Ohio?

Mr. Brown: No; there is no exception by reason of Ohio.

The Court: So, reduced to its lowest common denominator insofar as United is concerned, we have a case where United insured Page as to this vehicle, and at the time of the accident the vehicle was being used with Page's consent by Gilbert?

Mr. Brown: That is the correct fact.

The Court: Whose negligence was the proximate cause of the injury?

Mr. Brown: That is the correct fact.

The Court: In that situation what is the liability of Page under the California law as the owner of a vehicle used by another with his consent?

Mr. Brown: He may be held liable in damages under the California statute.

The Court: Is there any limitation upon that liability?

Mr. Brown: Insofar as permission is concerned it would be necessary to almost show that the car was stolen in order to avoid the application of the vicarious liability statute, but it is not an exclusive liability.

The Court: No. But is there any limitation upon it? [8]

Mr. Brown: \$5,000 and \$10,000 are the limitations that the statute imposes upon the owner.

The Court: And is that limitation applicable here?

Mr. Brown: That limitation is exceeded here as a matter of fact, although the stipulation may not cover it.

We stipulate that the injury cases are worth more than \$3,000 in settlement; as a matter of fact they are worth more than \$5,000 as applicable to the one person which the statute covers. The older, Robert Echols, was so seriously injured that his case is worth more in settlement than \$5,000 which is the applicable limit of the vicarious statute.

The Court: That is as to each person?

Mr. Brown: As to each person.

The Court: So the limits for the entire accident for which Page, and hence United, could be liable would be \$20,000?

Mr. Brown: Under the United Pacific policy the limit as to one person is \$10,000.

The Court: I am not talking about the policy. I am talking about the possible liability under the statute.

Mr. Brown: The possible liability under the statute of both injured parties would be only \$10,000 for their injuries. The damage to their automobile, property damage, would be in addition to that sum \$300.00 to \$400.00. [9]

The Court: It would be \$5,000 to the person.

Mr. Brown: It would be \$10,000 because two persons were injured.

The Court: I thought you said the statute provided ten.

Mr. Brown: Ten for all the persons in one accident; \$5,000 for one person injured.

The Court: So that the most, leaving Ohio Casualty out of the picture, that United could be held to respond for here would be \$10,000?

Mr. Brown: If we considered only the vicarious liability statute, your Honor, that is correct; but we have voluntarily insured him for an amount in excess of the required statutory limit.

Mr. Stanbury: When your Honor is following the method of interlocution, which I am glad to see the court doing, does the court care for any interruption on a matter of fact where your Honor makes a comprehensive statement?

The Court: Yes, if you are not agreed on the fact.

Mr. Stanbury: That is right. Everything Mr. Brown says we agree on as to Page, but that does not consider Gilbert, the driver.

The Court: Yes. Well, I am leaving Gilbert out of it for the moment.

Mr. Stanbury: I understand. The only reason I [10] interrupted was that your Honor used comprehensive language when you said that was all United Pacific could be liable for, and I wanted to straighten that out right now. I did not know whether your Honor had that in mind or not.

The Court: I am asking that as a question.

Mr. Stanbury: I follow you.

The Court: What could Page be held for?

Mr. Brown: There is no limit on what Page could be held for. There is a limit on the statute of \$5,000 for one person and \$10,000 for two persons.

The Court: Page is owner of the vehicle.

Mr. Brown: There is that limit. Your Honor is correct.

The Court: What could he be held for?

Mr. Brown: For \$5,000 for each of those persons, a total limit of \$10,000 for the accident. That is all Page could be held for.

The Court: Page, in that capacity?

Mr. Brown: In that capacity.

The Court: Insured by United, Page could be held for only \$10,000, hence United would be compelled to respond only to the extent of \$10,000, of course, plus the expense of defending; is that correct?

Mr. Brown: I believe that is correct, your Honor. Under the vicarious liability statute that is correct. That is the only reason that Page can be held here as an [11] individual, as owner of that car.

The Court: All right. That is the capacity in which you have insured him, isn't it, United has insured him?

Mr. Brown: We name him in other capacities, as shown in the beginning of the policy there. We name him and also H. B. Page. We insure him for more than that. This particular accident, however, occurs and gives liability to Page as an individual only by reason of the vicarious liability statute.

The Court: That is what I was attempting to frame my questions to ask. I do not mean with respect to other accidents. I mean with respect to this accident.

Mr. Brown: Yes.



The Court: Is it your contention that the limit of United's liability is only \$10,000?

Mr. Brown: Yes; insofar as Page is concerned.

The Court: Then, for the purpose of this accident, the limit of the policy would be only \$10,000, would it?

Mr. Brown: For the purpose of this accident. I see your Honor's reasoning. Yes; I believe that is true. We voluntarily issued the policy for a larger amount, but coming to what happened, that is correct.

The Court: For the purpose of this accident, the limit of your liability is fixed by the statute?

Mr. Brown: That is correct. [12]

Mr. Stanbury: As to Page, your Honor.

Mr. Brown: As to Page only.

The Court: As to Page in his individual capacity.

Mr. Brown: As an owner.

The Court: As an owner of the vehicle.

Mr. Brown: As an owner of the vehicle.

The Court: I am not referring to Page as a partner in the enterprise.

Mr. Brown: That is right.

The Court: Then, how could United Pacific escape liability for that coverage at least to the extent of \$10,000?

Mr. Brown: There are three reasons, your Honor. We go now to what happened and look at the extended coverage clause of the policy. It provides substantially that, in addition to the Page who is named—

The Court: Anyone using the vehicle with his consent would be covered, wouldn't he?

Mr. Brown: Yes, sir.

The Court: And Gilbert was, wasn't he?

Mr. Brown: He was, yes; we admit that. But there is a limitation on that extended coverage. That limitation is found in the other insurance clause, Exhibit B, page 2, line 64.

The Court: That is completely copied on page 5 of your brief, isn't it? [13]

Mr. Brown: It is, your Honor.

The Court: Well, let us look at that.

"If at the time of an accident there is any other insurance available to the insured—to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability under this policy is in excess of the applicable limit provided by the other insurance available to the insured this policy shall afford excess insurance over and above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy."

I take it that the next to the last sentence it not applicable here, is it?

Mr. Brown: That is correct, your Honor; it is not applicable.

The Court: Do you agree, Mr. Stanbury?

Mr. Stanbury: I do, your Honor.

The Court: Let us leave that out. It has a further proviso that covers another situation, doesn't it?

So, after the provisions for excess liability above the limits of other insurance to the extent of the limits of

this policy, the last sentence or clause provides that the [14]

“Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance which is available to the insured.”

Now, who is the “insured”?

Mr. Brown: That is defined, your Honor, on the same page under “Definitions,” line 26:

“The unqualified word ‘insured’ includes not only the named insured but also the spouse,”

the wife.

And coming to this case, paragraph (4)

“any person while using an owned automobile or hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the named insured, and also any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured.”

Then your position as applied to this case would be that Gilbert is insured within that definition?

Mr. Brown: Yes; within that definition.

The Court: That Gilbert, being an employee of the McKeon-Page concern, whatever insurance that concern had would be available within the meaning of the definition and that, hence, under no circumstances, according to this last sentence of the “other insurance” provision of the United [15] Pacific policy there could never be any concurrent insurance. Then, as you construe it, what this alludes to, this “other insurance” provision, it operates to nullify the extent of the coverage?

Mr. Brown: It does. It is a definite limitation on the extended coverage clause. That is why it is in the policy.

The Court: So the effect of this policy, as you read it, would be that there being other coverage available, there is no insurance so far as United is concerned on this accident?

Mr. Brown: That is correct, your Honor.

The Court: Now, if we read the Ohio Casualty policy the same way, we reach the same result.

Mr. Brown: That is why we are here.

The Court: So the result would be, if we follow both arguments and apply that argument to both policies, each insurance policy would knock each other out and there would not be any insurance.

Mr. Brown: Take them literally, that is precisely what would happen in this case, your Honor. Take these two policies literally, that is precisely the result. There would not be any insurance for anyone if you take these two policies literally. That is why we feel that the statutes of this state and the Insurance Code must be read into the contract and that the two contracts must be construed from their four corners in the light of what has happened. [16]

The Court: Of course, the big "if" in both of these "other insurance" clauses is whether there is any other insurance available.

According to the reasoning we have just adverted to, there is no other insurance available. In other words, if you take United's policy and read it, we come to the question: Is there any other insurance available, don't we?

Mr. Brown: Yes.

The Court: So you look around to see if there is any other insurance available and you read Ohio's policy and

you find that that is not available; so there is no other insurance available.

Mr. Brown: We, of course, do not concede that their policy is not available. That is their contention also.

The Court: You necessarily concede that, don't you, when you concede that the literal effect of each policy is such that, if given effect literally, there would be no insurance here?

Mr. Brown: That is right.

The Court: It doesn't make any difference which policy we read first. You represent United Pacific, so we are going to read United Pacific's policy first. So we pick it up and we start to read it and we find it insures Page. We find that Page gave Gilbert permission to use the vehicle. We find that the extended coverage clause, at first blush, [17] applies. Then we ask does the "other insurance" clause limit the extent of the coverage of the policy. It is:

"If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except"

as to the excess.

We will leave that aside for the moment. So we look around to see if there is any other insurance available. We read Ohio Casualty's policy. If we read it literally, it is not available, is it?

Mr. Brown: To whom? Available to whom?

The Court: To anyone.

Mr. Brown: That is the question. That is where we come next. And the next step is: available to whom, to the injured parties?

The Court: Let us assume you ascertain it is not available to Gilbert, it is not available to anyone. If it

were applicable, of course, it would be available. But if you read Ohio Casualty's policy, it is not available because United Pacific's is available.

Mr. Brown: If I might interrupt your Honor's thinking for one moment here?

The Court: Am I correct that far, literally stated?

Mr. Brown: Yes. But you are just coming to the next [18] step, your Honor, and that is this: Why are we trying Gilbert throughout this case? Gilbert is no more an essential party to the controversy in the state case, the damage action, than if he were a mere myth.

The statute imposes vicarious liability on Page as an owner. We all know that the master is responsible for the negligent acts of his servant, therefore, the injured parties in San Luis Obispo County do not need to find Mr. Gilbert, do not need to go out of the State of California and find him in order to recover for their damages for their injuries.

Gilbert has been throughout this case on a theory which has come from the other side of the controversy. We do not feel that Mr. Gilbert is any more a necessary party to either this proceeding before your Honor this morning or to the other court than if he did not exist.

The Schilling case, early in California jurisprudence, decided that. The Schilling case holds, your Honor, that it is not necessary for a servant to be joined in a damage action along with the master. The injured party, the plaintiff, may elect as against whom he will proceed.

That is why we are having our difficulty in this case; we are giving too much thought to Mr. Gilbert. Mr. Gilbert can be a mere myth and the parties in this case can recover for their injuries and the controversy can be decided as between these two companies. Your Honor



was certainly correct in [19] suggesting that he be dismissed from this proceeding.

The Court: Then why wouldn't United Pacific, then, under its policy, which insures Page as owner and is responsive in this situation for Page's vicarious liability under the statute?

Is there any other insurance that covers Page's vicarious liability as owner of this truck?

Mr. Brown: Yes, your Honor; there is. Turn now to the Ohio Casualty policy, who is the second named on there as a named insured, G. B. Page. Page is a common name to both these policies. He is in both of them, and there is a statute in California which defines the owner of a motor vehicle for insurance purposes as "any person named as an insured." That statute is quoted in our brief.

The Court: But does the Ohio policy cover this particular vehicle?

Mr. Brown: Yes. Your Honor, here is the confusion that might exist: Neither of these policies of insurance makes any mention of the accident vehicle. These policies are written on what is now described as the "comprehensive liability form."

The Court: So they both stand on the same footing so far as identifying a particular vehicle?

Mr. Brown: That is correct. A particular identification of the vehicle is not necessary. [20]

The Court: No. I understand. I did not recall from my examination whether either of them mentioned the vehicle.

Mr. Brown: No.

The Court: I thought perhaps United did.

Mr. Brown: We do not, neither does Ohio Casualty. And while we are on this subject of what the Ohio Cas-

ualty policy covers, I wish your Honor would turn to Exhibit B, page 5. I think we can settle this controversy as to the meaning of the Ohio Casualty policy very shortly by reference to the endorsement. It is entitled "certificate of insurance." It is numbered page 5 on Exhibit B.

The Court: Yes; I have it before me.

Mr. Brown: It was issued at a time subsequent to the issuance of the policy. And, of course, as your Honor will recall, it is fundamental that any endorsement bearing a subsequent date to the policy controls should there be a conflict.

Now, then, what is the "Description of risk" under that certificate of insurance? It says:

"Coverage applies to all automobiles owned or operated \* \* \*."

Certainly this automobile was operated by McKeon and Page.

The Court: I do not think there should be any question about that. There is no dispute about that, is there?

Mr. Brown: From the photograph of the truck there is no [21] dispute about it.

The Court: Who is the named insured here?

Mr. Brown: The named insured?

The Court: In the Ohio Casualty's policy.

Mr. Brown: The named insured appears first on the regular form of the policy as R. H. McKeon and G. B. Page.

The Court: Doing business as Pacific Laundry and Dry Cleaners; correct?

Mr. Brown: Yes, your Honor; that is correct. Then on subsequent endorsements others are named, also,—not that it makes any difference, we feel.

The Court: You mean the Fashion Cleaners and Mission Laundry & Cleaners?

Mr. Brown: Yes, your Honor.

The Court: But it is always McKeon and Page, isn't it?

Mr. Brown: Yes; it is always McKeon and Page. Our position is that the Ohio Casualty is responsible under the vicarious liability statute the same as the United Pacific policy, because the statute and the Insurance Code quoted in our brief defines an "owner" for all the purposes, and says an owner is any person who is named as an insured in a policy of automobile liability insurance.

The Court: I tried to follow that argument in the brief but I did not get very far with that.

Mr. Brown: Well, the statute goes further, your Honor, and [22] says why it was passed. It was passed to prevent mistake—the exact words are better than my recollection.

The Court: "Fraud," as I recall.

Mr. Brown: Yes.

The Court: But let us take the names of these insured. The United Pacific policy mentions Page, individually, doesn't it?

Mr. Brown: It does.

The Court: Among others. The Ohio Casualty mentions only Page, in his capacity as a partner with McKeon, doesn't it?

Mr. Brown: Yes; in connection with the business. That is conceded, of course.

The Court: Doesn't that leave us with this situation: That while Page's assets are amenable to execution, the debts of the partnership, the primary liability would be assets of the partnership; would that not be true?

Mr. Brown: That would be true.

The Court: So the primary liability for the damage Gilbert caused in this situation here would be the partnership and its assets?

Mr. Brown: That is true.

The Court: Is that correct?

Mr. Brown: That is true.

The Court: And that is the liability, is it not, of the Ohio Casualty insured? That is the liability of the [23] operator, isn't it? It is not the vicarious liability under the statute of the owner, is it?

Mr. Brown: We feel, your Honor, that under the statute, the plain language of the statute, the word "owner" as used in this section means any person who is named as an insured. Therefore, R. H. McKeon is an owner of this accident vehicle by the clear language of the statute.

The Court: That may be an owner for the purpose of reading an insurance policy. I am referring to the owner mentioned in the code.

Mr. Brown: The actual owner under the Motor Vehicle Registration Act?

The Court: The owner who is held vicariously liable under the statute where the automobile is used by another with his permission, is not that owner defined in the definition as set forth in the Insurance Code to which you referred?

Mr. Brown: No. This owner here is the owner mentioned in the insurance contracts.

The Court: Yes.

Mr. Brown: Not the party who must go up and pay the license fee and secure the registration.

The Court: All right. Then do we not have this situation here: Do we not have a situation where United Pacific insured the owner, that is, the man who is held

liable [24] vicariously under the statute? United Pacific insured that man's liability and insured that liability?

Mr. Brown: That is, that was one of the hazards. We do not deny it.

The Court: In other words, we are not going to treat this matter in a vacuum; we are going to apply this policy to this case.

Mr. Brown: That is it exactly.

The Court: So, as applied to this case, your policy, the United Pacific policy, clearly covered the vicarious liability of the owner under the statute?

Mr. Brown: Correct.

The Court: A maximum of \$10,000 liability.

Now, let us turn around and put Ohio Casualty's policy in this case. What liability did Ohio Casualty insure?

Ohio Casualty insured the respondeat superior liability of the partnership, McKeon and Page, did it not?

Mr. Brown: They did.

The Court: And what is that liability? Isn't that liability an entirely independent creation of the law from vicarious liability of the owner?

Mr. Brown: It arises from a different ground; yes.

The Court: It is an entirely different liability, isn't it?

Mr. Brown: Yes. But— [25]

The Court: And there is no limit to it, is there?

Mr. Brown: No limit whatsoever.

The Court: It is not a creation of the statute; it is a creation of the common law, isn't it?

Mr. Brown: Yes; it is the creation of the common law.

The Court: So, do we not have two different insurance companies here insuring two different types of liability?

Mr. Brown: No; I can't believe that is correct, your Honor. There are three reasons why it is not.

No. 1, of course, is the insurance code definition defining "owner" for the very purpose—

The Court: That is a different one. That is talking about the owner mentioned in the insurance policy, whereas we are talking about the owner mentioned in the statute imposing vicarious liability.

Mr. Brown: Your Honor would be absolutely—

The Court: Which might be an entirely different type of person, because the owner mentioned in the insurance code definition to which you refer would include the man who is driving with the consent of the owner mentioned in the statute imposing vicarious liability, would he not?

Mr. Brown: Yes; that is true.

The Court: In other words, specifically applied here, it would include the owner. Gilbert would be an owner within the meaning of that insurance code definition, would he not? [26]

Mr. Brown: No, no, no, your Honor; because Gilbert is not named on the face of the policy.

The Court: Using it, operating it with the consent of the owner.

Mr. Brown: Not under Section 383.5. The word "owner" as used in this section means any person who is named as an insured in such contract of insurance or document.

The Court: Perhaps I am remembering it incorrectly. Is that all it says?

Mr. Brown: No; there is more to it, some of which we did not feel was pertinent. But it concludes with a recital of its purpose. That recital is in the following language:

"The purpose of this section is to prevent fraud or mistake in connection with the transaction of insurance covering motor vehicles and in furtherance of



that purpose the commissioner may make reasonable rules and regulations therefor.”

It seems to fit like a glove your Honor’s thought of a few moments ago. I can fully appreciate that would be controlling, though a statutory defense under the vicarious liability statute would end the matter if we did not have any insurance in the picture. But here we have two policies of insurance, and Section 383.5 was written specifically to cover insurance policies on automobiles and it has its own recital of why it was passed. Therefore, we feel that it [27] is controlling. It was passed for a particular purpose, according to its own language.

The Court: The definition of “owner” in Section 383.5 of the Insurance Code is applicable only to that section, isn’t it?

Mr. Brown: But the purpose of the section—just there, it is true that that would go only as to what that section means, but that section deals specifically with insurance on motor vehicles and it concludes with that recital of why it was passed.

The Court: Yes. Does that definition, which is limited to “owner” as used in that section, namely, section 383.5, carry over and becomes the definition of “owner” under the statute imposing vicarious liability?

Mr. Brown: The two statutes deal with entirely different subjects, your Honor. One deals with the ownership of motor vehicles, having no apparent thought to insurance; and if we did not have any insurance policies involved here, the statute defining “owner” as to his liability would end the matter.

But here we have not one, but two, policies of insurance and the statute dealing specifically with contracts of insurance on motor vehicles, passed on a subsequent date,

dealing specifically with the subject matter under consideration. [28]

The Court: What is the citation of the statute imposing vicarious liability?

Mr. Stanbury: 402 of the Vehicle Code.

The Court: 402 of the Vehicle Code.

Mr. Brown: 402 of the Vehicle Code. I do not have it at my fingertips.

Mr. Sackett: I have it right here.

The Court: It is virtually the same today, isn't it, as it was when it was in the Civil Code?

Mr. Stanbury: That is correct, your Honor.

Mr. Sackett: No change.

Mr. Brown: We have it here if your Honor wants it.

The Court: I have sent for a copy. Would not the fact that that provision is an entirely different code militate against your argument that the definition of "owner" as contained in the Insurance Code section 383.5 would carry further?

Mr. Brown: My understanding of the statutory construction, your Honor, is this: There are two or three fundamental principles. One is that if we have a statute dealing with a particular subject matter, then it applies. We have here a statute dealing with contracts of insurance and those contracts of insurance are the cause of our controversy. The existence of these two contracts is why we are here this morning. [29]

The Court: But we have to look outside the insurance code and outside the policy to determine whether there is any liability on the part of the insured for which the insurer must respond, do we not?

Mr. Brown: Your Honor is quite correct.

The Court: And the policy only measures the obligation of the insured to respond to a previously determined liability of the insurer; is that correct?

Mr. Brown: That is correct.

The Court: So we must look; and first, we must determine who are covered—not what is covered, but who are covered by the policy.

Mr. Brown: Who are covered.

The Court: Here your policy covers Page, doesn't it?

Mr. Brown: It does; it covers Page.

The Court: As owner of the vehicle?

Mr. Brown: That is correct.

The Court: What are Page's liabilities here? He has a liability as a partner with McKeon, doesn't he?

Mr. Brown: He does have.

The Court: You do not cover that liability, do you?

Mr. Brown: We have felt that we did not. The other side of the case contends we do.

Mr. Stanbury: No; we do not contend that, only if your argument is sound. Pardon me. We make that contention [30] only if your argument as to us is sound, we say. If the identities of the parties are destroyed as against one party, they must be determined against the other. If Page is "Page," then "Page" in your policy and ours alike. But we do not make that contention except as a reply to an opposing argument.

The Court: Go back just a moment to your definition of "owner" in Section 383.5. "Owner" as used in this Section means any person who is named. Do you read that to mean that the name actually has to be in there?

Mr. Brown: Yes; by typing it there or by writing it in. That is what I understand, that his name, the act of naming takes place when the policy writer puts this

piece of paper in her typewriter and writes it up. That is the naming of the insured, is my understanding.

The Court: All right. Then as far as your case is concerned, the only person named in your policy, that is, United Pacific policy, would be Page. You insure Page. You insure Page. And before we look to determine how far or for how much and to what extent you insure Page, we must look first to see whether Page has liability; and if so, what is his liability; is that correct?

Mr. Brown: That is absolutely correct.

The Court: So that is measured, not by the policy; that is measured by the law, isn't it? [31]

Mr. Brown: Or the statute.

The Court: Well, by the common law and the statute. We look to the whole body of the law, do we not, to determine whether Page has any legal responsibility to answer in damages to the persons who were injured in this accident; so we look to the whole body of the law to determine, not to the policy?

Mr. Brown: We do that.

The Court: We look to the whole body of the law to determine what, if any, are Page's liabilities; and we find what? That he has two liabilities, do we not, two types of liability? 1, he has a vicarious liability under the statute as an owner of the vehicle; 2, he has the liability as partner, which is a secondary liability, under his partnership of McKeon and Page, doesn't he, to respond for the act of the agent of the partnership; is that correct?

Mr. Brown: I believe your Honor has overlooked one ground of liability. First, the vicarious liability under the statute; second, the liability of Page as a partner in Pacific Dry Cleaners—

The Court: What is the Pacific Dry Cleaners?

Mr. Brown: That is the business in which—

The Court: Is that McKeon's?

Mr. Brown: That is McKeon's.

The Court: It doesn't make any difference which partner- [32] ship it is, does it? They are McKeon and Page, aren't they? Those are the partnerships?

Mr. Brown: Yes; they are McKeon and Page.

The Court: So Page has a liability of what sort to respond for the negligence of Gilbert otherwise than as owner of the vehicle under the statute?

He has the liability at common law to respond to the extent of any deficiency that might remain after the partnership has been compelled to respond; is that correct?

Mr. Brown: Yes; that is correct. But his liability, first, is that of a partner of McKeon. I thought we were losing track of him. I thought we had forgotten him there as a partner of McKeon.

The Court: No. What would you do? Of course, you can argue philosophically about what a partnership is, but the effect of it is that the partnership is an entity. It is a question of who has to pay, and that is the important thing. If you have that partnership liability, you can be compelled, if you have a claim against the partnership, you can be compelled to resort, first, to the assets of the partnership, can't you?

Mr. Brown: That is correct.

The Court: So the partnership is primarily liable, isn't it?

Mr. Brown: Yes; that is right. [33]

The Court: So Page's other personal liability is a secondary one, isn't it?

Mr. Brown: Insofar as a judgment.

The Court: As an individual, his liability is a secondary one?

Mr. Brown: Yes; I think that is correct.

The Court: All right. United Pacific insured him in his individual capacity; isn't that correct?

Mr. Brown: Yes, followed by a trade name. Yes; we insure him personally, individually and also under his trade name.

The Court: We have disposed of his liability tentatively. You have not insured him as a co-partner in any enterprise, have you?

Mr. Brown: Yes; co-partners not having anything to do with this case.

The Court: Yes; having nothing to do here. So, insofar as these partnerships are concerned, your coverage is Page, anyway, and Page as an individual.

Mr. Brown: Yes; I think that is correct.

The Court: Now, let us assume for the moment that there was no statute imposing vicarious liability upon Page as owner. If these two policies were in existence would not the United Pacific be here saying that Ohio Casualty insured the partnership; Ohio Casualty is primarily liable; we are [34] liable only to respond to Page as an individual.

Mr. Brown: Well, our position is—

The Court: If that would be true, then it would be a sound view, would it not, to say that United Pacific here insured Page's liability under the statute? Ohio Casualty insured the liability as a partner of McKeon to respond for the negligence of an agent of the partnership, Floyd Gilbert?

Mr. Brown: I know what your Honor has in mind. He is comparing the coverage of the two policies.

The Court: No. If you agree as to those liabilities, then we look to see if they are covered by the policies, do we not? That is the second step.



Mr. Brown: Well, we agree as to those liabilities.

The Court: All right. Who covers them? There is no question, is there, but what United Pacific covers vicarious liability of Page as owner under the statute?

Mr. Brown: That is conceded.

The Court: Shall I say the statutory liability of Page? All right. Who covers the liability of Page as a partner? That is the common law liability to respond for the negligence of the servant and agent. Does the United Pacific cover that?

Mr. Brown: We feel that Ohio Casualty covers it.

The Court: This is a common law liability wholly apart from the statutory liability, isn't it? If we can agree that [35] it is sound to say Ohio Casualty covered the partnership by the common law liability and United Pacific covered the statutory liability, we do not have a case where the same insurance covers the same responsibility, do we?

Mr. Brown: I am wondering under the statutory definition of "double insurance" if that is correct. I have the statute handy here. The Statute, Section 590 of the Insurance Code, says: "A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest."

The Court: All right. Now let us carry it a step further. The insurer does not sue under the statute and does sue under common law; the effect of the statute is to compel the owner, as owner, to respond for the damages to the extent of \$5,000 as to each individual or, we will say, \$10,000 here. So Ohio Casualty is called upon to respond to all of the damages at common law to the extent of the limits of its liability, to the extent of the limits of its policy, is that correct?

Mr. Brown: That is correct.

The Court: Then don't we have the damage and the responsibility, bearing in mind that the injured person could only recover once—don't we have a situation where part of the liability is covered by both policies, that is, the liability up to \$10,000? [36]

Mr. Brown: In all candor and fairness to the court, I have worked on this case quite a while.

The Court: I know that both of you gentlemen have.

Mr. Brown: And I have come to the conclusion a long while ago that both of these policies do apply, and that they both insure for the protection of the persons who suffer injuries and damages, and that the liability should be prorated in accordance with two California decisions.

Mr. Stanbury: And, to clarify the issues, we concede that entirely except as to Gilbert. I mean we are agreed on that. We have conceded it in one of our briefs except as to Gilbert.

The Court: Let me get your understanding, gentlemen. You are agreed, are you, that laying aside for the moment Gilbert's independent liability, that Ohio Casualty's policy covers the liability of the partnership for the acts of Gilbert, shall we say the common law liability, to the extent of the limits of its policy, and United Pacific, under the statute, is also liable under its policy to respond to the extent of \$10,000; so there is double insurance to the extent of the first \$10,000? Is that what you are agreed upon?

Mr. Stanbury: We concede that, that at San Luis Obispo, at the present time, we have a joint liability with the other company and our point arises and revolves around who covers Gilbert. [37]

The Court: Then you have double insurance to the extent of \$10,000, is that it?

Mr. Stanbury: Without getting into such quibbles as they go up, I think that is correct.

The Court: Well, that seems sound. Ohio Casualty has covered the partnership, McKeon and Page. That partnership, the partners were sued, the statute says that Page as owner, by reason of his ownership of the vehicle wholly apart from his status as a partner, by reason of his ownership and his consent to the operation of the vehicle by Gilbert at the time of this accident, Page, in his individual capacity as owner, is responsible to the extent of \$10,000 for injuries. We have both companies covering the first \$10,000 of the liability. Is that agreed?

Mr. Stanbury: Yes, sir.

The Court: Now, what is the status of Gilbert?

Before we take that up, let us give the reporter a little relief and take the morning recess of five minutes.

(Short recess.)

Mr. Brown: As I understand your Honor, we have now reached the point where we can take up the coverage as applicable to Mr. Gilbert.

The Court: Yes. Isn't the situation this as far as Gilbert is concerned? The liability of Page, as owner, the liability of the partnership, as a partnership, all arises from [38] the acts of Gilbert and the liability of Gilbert. The partnership is called upon to respond to the full extent for the liability of Gilbert. Page, as owner, is required to respond to the extent of \$10,000 for the liability of Gilbert; so do we not again have the situation where, as far as Gilbert is concerned, United Pacific covers it to the extent of \$10,000 and Ohio Casualty covers it to the full limit of the policy?

Mr. Brown: By that am I to understand your Honor feels that the two companies cover concurrently, or is one to pay up to ten and then the other begin paying, or do

both companies, in your Honor's thinking at the moment, cover concurrently?

The Court: My question embraced the proposition that there was double insurance with respect to Gilbert; in fact, the double insurance with respect to Page arises out of Gilbert's act and Gilbert's liability, does it not?

Mr. Brown: Yes. And I believe this is a good time, your Honor, to take up—

The Court: Does not the double insurance which you gentlemen have conceded to exist necessarily spring from Gilbert's liability?

Mr. Brown: That is the proposition I would like to discuss a few moments now.

I have carefully read the case of Consolidated Shippers, [39] I have examined the briefs that are on file and the arguments made.

First, the contention here, the entire theory of this case insofar as the Ohio Casualty is concerned, is simply this, your Honor: That it insures McKeon and Page as a co-partnership; that Gilbert, as the agent and servant of that co-partnership, committed a negligent act; therefore, if the Ohio Casualty is required to pay anything in this case, it is then in turn subrogated to the rights of the employer and may recover its loss from the driver Gilbert.

Point 2 of that theory is that the Ohio Casualty policy does not cover Gilbert personally, but that the United Pacific policy does cover Gilbert personally; therefore, we will now step to the end of this chain of events and fix the ultimate liability in this case on the United Pacific by reason of this theory of subrogation.

Am I correct in my statement of your theory?

Mr. Stanbury: Very well stated.

Mr. Brown: Now, at that, I think we have reached the point, your Honor, where we can talk about that for a few moments.

If that theory fails, then there leaves nothing but the conceded double insurance in this case, and the two companies will prorate this liability or loss either on a 50-50 basis or such basis—we contend five-sevenths and [40] two-sevenths—or such basis as your Honor decides. But first we must dispose of this theory of subrogation. I would like to discuss that for just a few minutes.

First, we feel that the Ohio Casualty policy covers Gilbert. There are three reasons. One is that the “extended coverage clause” of the Ohio Casualty policy provides substantially that any person driving a motor vehicle covered by the policy is protected, provided the permission is there, if it is an owned automobile.

Here is the point where we feel that Section 383.5 is of the utmost importance. The statute takes care of that issue here and says that McKeon and Page are the owners for the purpose of insurance, and concludes with a recital of why it was passed, to prevent fraud or mistake. That is reason No. 1.

Therefore, this accident vehicle, within the meaning of Section 383.5, is a motor vehicle owned by the insured named in the Ohio Casualty policy. The statute says so in very, very plain language, concluding with the recital of why it was passed, giving its purpose.

That, I feel, disposes of the point that Gilbert’s liability was not personally covered under the Ohio Casualty policy. Point 2. To rebut that theory, the certificate of insurance does not limit the description of risk to automobiles owned in the name of the named insured. It goes [41] further and adds the words “or operated.”



It is stipulated and conceded in this case that for one year the accident vehicle had been operated in the business of the insured named in the Ohio Casualty policy. We feel that the certificate of insurance supersedes and takes the place of any conflicting language in the body of the policy. For that reason, also, Gilbert personally was insured under the Ohio Casualty policy.

Point No. 3 is that by operation of law in California, under the aggregate partnership theory, George Page was owner of that vehicle and he is named in the Ohio Casualty policy. Each partner owns what the other contributed to the conduct of the partnership enterprise. California does not follow the entity theory in partnership.

A fine treatise was written on that point in the case we have cited in our briefs. The case there goes to the trouble of going back and discussing the various theories of the law, civil law and all others.

The next point is that, in all fairness, here we have the two companies covering certain hazards. The hazard that occurred is more specifically covered by the Ohio Casualty policy, for the reason that the accident out of which all of this liability arose occurred on the business of the insured described in the Ohio Casualty policy.

The United Pacific policy covered Mr. Page, individually, [42] and doing business under the fictitious name not involved in this controversy; but the Ohio Casualty policy covered McKeon and Page in Pacific Dry Cleaners and it was in that business that the liability or lawsuit arose. As your Honor has, of course, found already, and correctly so, that Page as an owner of the vehicle, yes; he has that vicarious statutory liability, but certainly that is not an exclusive liability.



The Court: Well, it would not matter anyway, would it?

Mr. Brown: No.

The Court: If Ohio Casualty is subrogated through Gilbert to sue United Pacific, then by the same process of reasoning would not United Pacific be subrogated to Page to sue the partnership, and hence compel Ohio Casualty to respond to the partnership?

Mr. Brown: That is right.

The Court: It being an agent of the partnership who committed the tort?

Mr. Brown: That is right; the theory works both ways.

The Court: I have not been able to see that it would not work both ways.

Mr. Brown: It certainly does work both ways.

In the Consolidated Shippers case—I know your Honor is familiar with it by now—I have gone and secured the briefs of the parties in that case. The very theory that the [43] Ohio Casualty relies on in this case was argued at length and was before the court in that case, and was rejected for this reason: It was argued there that Harvey—the man's name was Harvey who holds the corresponding position to Gilbert in this case—it was argued that Harvey had the primary liability, and that if Pacific Company in that case paid, it would be entitled to subrogate through its insured and, therefore, reach the other policy—the identical theory that is being advanced here—but the court considered that and rejected it.

I am now looking at the brief in the District Court of Appeals filed by one of counsel, Kenneth J. Murphy, beginning at page 57. He takes up this same argument that is being advanced in this case.

Since Consolidated Shippers was only vicariously and secondarily liable, and since the Pacific policy is excess insurance only, Consolidated Shippers is now subrogated by virtue of such payment to plaintiff to the rights of the plaintiff in the Arizona action.

Furthermore, the Commercial policy expressly provides that its coverage was to extend to Consolidated Shippers, which is on all fours with our proposition here.

And then he quotes the provision from the policy.

Since Consolidated Shippers is subrogated to the benefits of the Commercial policy, if Pacific paid all or a part [44] of said sum to Consolidated, Pacific would be subrogated pro tanto to the benefit of the Commercial policy—the identical theory being advanced by the Ohio Casualty here.

I point out that this question was argued before the court to show that it was considered, because the opinion is not any too satisfactory upon all points that were argued.

Now turning to the opinion, here is how the court disposed of that:

“Pacific contends that Harvey was primarily liable, that plaintiff was secondarily liable and that the judgment correctly determines the respective liabilities. No California case is cited in support of this proposition and we know of no law in this state fixing degrees of liability in relation to the joint liability for torts. From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone”—

citing *Schilling v. Central California Traction Co.*—

“or against both jointly, it would seem that there could be no such thing as primary and secondary

liability. Moreover, the court made no finding on the issue of primary and secondary liability as between Harvey and plaintiff, and in fact made no finding concerning the relationship existing between Harvey [45] and plaintiff out of which the latter's liability arose. In view of our conclusion that both policies insured the same risk so far as plaintiff is concerned, the fact that plaintiff's liability may have been primary or secondary becomes immaterial. \* \* \*

How does that apply in this case? Let us go now to the action for damages pending in the State Court in San Luis Obispo. Mr. Page is named as the first defendant, because he is owner of the accident vehicle; McKeon and Page are named as the second defendant, because it was out of their business operations that the accident arose, their employee was driving the truck; Gilbert, the employee, was named as the third defendant. Those are the three defendants against whom recovery is sought.

Gilbert, for reasons unknown to me, left the State of California. He has not been served. Therefore, we have two defendants in the action for damages in the State Court in San Luis Obispo County.

One is Mr. Page. Why? Because his liability is predicated on the ownership statute. It is vicarious liability.

Two, McKeon and Page, because that co-partnership was the employer of Gilbert. Mr. Gilbert is no one in the picture.

Now, then, the plaintiff—the plaintiffs—there are two of them in that action for damages, are not obliged to [46] elect. They can pursue anyone legally responsible for their injuries and damages. They certainly do not have to pursue Mr. Gilbert beyond the limits of the State of California. They certainly do not have to elect to

pursue Mr. Page. If so, his limit of liability would be \$10,000. They would not get enough money.

As the court points out here, there isn't any such thing as degree of liability in tort actions. If they are liable in tort, they are liable in tort and the injured party may sue and recover from the person that he finds within the jurisdiction of the court.

This argument that because only United Pacific policy covered Gilbert's liability personally, and the Ohio Casualty policy did not cover that liability personally, then that the Ohio Casualty, before it can follow all around and come back over here and say to Mr. United Pacific, "This is all your liability because we can subrogate," that was fairly considered and rejected herein the Consolidated Shippers case.

And we have stipulated and agreed and, of course, your Honor knows, without us having done it that the law of California applies to this case, because both policies were issued in California; it is a California matter so far as the substantive law is correct and there is no dispute to the contrary in this state. The court there rejected that doctrine, [47] rejected that argument, the same theory of the case that is being presented here today, upon that one ground that they say we know of no California case that fixes degrees of liability as between joint tort feasons, and certainly there isn't any.

It certainly would be unfair to require any plaintiff to elect as between two or more or among several joint tort feasons as to whom he should recover from. Therefore, in this case the entire theory must fall.

There are three reasons, as there, why the Ohio Casualty policy covers Gilbert personally. The statute says the persons named in that policy were the owners of that

vehicle. That statute was passed specifically to cover insurance contracts covering motor vehicles.

Two. The certificate of insurance specifically says that it covers or its description of risk covers all automobiles owned or operated, not owned and operated, but owned or operated. That certificate of insurance was placed on this policy subsequent to the issuance of the policy and, of course, takes precedence.

The Court: Where is that, now?

Mr. Brown: That is page 5 of Exhibit B, your Honor.

Mr. Stanbury: May I call attention to one thing by way of interruption, your Honor?

The Court: Yes. [48]

Mr. Stanbury: If you will study that, you will notice that it was issued for a special operation, not issued for the insured but the camp post exchange, Camp Cooke, California. It is a certificate of insurance issued to an outfit, and there is nothing to show this man was on any activities for Camp Cooke or under that certificate, and I think we probably can agree that he was not, for that matter.

The Court: Doesn't the certificate constitute an admission by Ohio Casualty Company?

Mr. Stanbury: It is a representation to somebody who might be secondarily liable, your Honor, for example, a camp post exchange, what it was covering as far as it is concerned. I do not believe it vitiates any other claim in connection with these parties. It shows what the parties understood.

The Court: You are referring now to the first sentence of the intended coverage?

Mr. Stanbury: Yes, sir. I am referring to the whole policy and to the certificate as being what it shows itself on its face to be, a representation to someone else.



The Court: It would only be important here if it served to modify the first paragraph of the extended coverage clause?

Mr. Stanbury: That is right. Yes, sir; that is correct.

Mr. Brown: We feel, your Honor, that the best evidence [49] of what the policy really means is what the company said the policy meant at a time subsequent to its issuance.

The Court: If Gilbert is an additional assured of United Pacific's policy, and not of Ohio's, do you agree with Mr. Stanbury's argument with respect to subrogation?

Mr. Brown: No, your Honor. That does not dispose of the case. The statutes must be read and taken into consideration. There is a statute which says what double insurance is. We feel, regardless of the coverage as to Gilbert personally, that there is double insurance, because the statute controls. The statute defines double insurance.

The Court: What constitutes double insurance?

"A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest."

Mr. Brown: Which means that both parties must pay.

The Court: Must pay what?

Mr. Brown: The liability or loss that comes up.

The Court: In what proportion?

Mr. Brown: That is the next question.

The Court: The statute does not say?

Mr. Brown: The statute does not say in what proportion. That is the most difficult one to argue.



The Court: Will the statute modify the rules of subrogation? [50]

Mr. Brown: In dealing with insurance contracts?

The Court: Yes.

Mr. Brown: I believe that it will.

The Court: In other words, your argument is that policies are issued subject to the Code provisions, the Insurance Code?

Mr. Brown: Precisely, your Honor; in fact, each policy.

The Court: If there is double insurance within the meaning of Section 590 of the Insurance Code, then there is double liability, that is, there is liability of both insurers fixed by the Code.

Mr. Brown: Fixed by the Code.

The Court: Where is that liability fixed?

Mr. Brown: That is a problem that your Honor will have in this case. I undertook to answer it on the Belt Casualty case, the *Lamb v. Belt Casualty* case, which we cited in our brief and which is the last authority discussed. The court there said: “\* \* \* that the liability thereunder shall be that proportion of the total liability which the limits of the policy bear to the whole amount of such collectible insurance.”

Now, in this case, as applicable to one person the Ohio Casualty provides \$25,000; the United Pacific, as applicable to one person, provides \$10,000. There then is insurance protection of \$35,000. And if the companies are to share liability in accordance with the limits stated in [51] their policies, as held by the court in *Lamb v. Belt Casualty*, then it would seem to me that we would take \$35,000 and then take 10/35ths, which is 2/7ths, and 25/35ths, which is 5/7ths, and that is where the liability falls.

There is no reason to say it is a 50-50 proposition, because the policies are issued in different amounts.

The Court: Isn't the situation this with respect to this accident and to the legal problems of the liability to which the insurers are called upon to respond here, laying aside this Gilbert argument, that there has been a subrogation? There is a joint liability of both insurers up to \$10,000. Is there any reason why that should not be shared equally, the \$10,000?

Mr. Brown: Yes. The policies say, each of them in its "other insurance" clause, each of the contracts tries to decide that, but those other insurance policies do not quite fit this case.

The Court: If you are referring to the policy limits, couldn't you argue just as well that, for the purpose of this case, the limits of the policy of United Pacific is \$10,000?

Mr. Brown: As to one person—oh, I see, under the vicarious liability law. Yes; we could argue that it is \$5,000 for injuries to one man in that year.

The Court: There is no necessity of talking about injuries to one person. There are two people injured here, [52] aren't there?

Mr. Brown: One is injured seriously and the other only superficially.

The Court: Well, that is immaterial, isn't it? Two people are injured?

Mr. Brown: Two people are injured.

The Court: So the limit is \$10,000 under the facts stipulated here?

Mr. Brown: That is right.

The Court: United Pacific covers that liability up to \$10,000; Ohio Casualty also covers that liability up to \$10,000 a year?

Mr. Brown: A year.

The Court: The limits of the policy.

Mr. Brown: Yes.

The Court: Is there any reason why both should not be jointly responsible up to \$10,000? The policy limits are not called in question, are they?

Mr. Brown: No; they are not.

The Court: Because the double coverage is well within the limits of both policies, isn't it?

Mr. Brown: It is well within the limits.

The Court: So why should the policy limits cover?

Mr. Brown: I was following the decision of *Lamb v. Belt Casualty*. In that case one of the policy limits, as I [53] recall, was \$10,000 and \$100,000, and the other was \$5,000 and \$10,000; and the court stated there—I have covered that at the very end of the brief, where I gave quite a little thought to that, and we feel that the court there did follow the rule that the liability of the company should be apportioned in accordance with the limits of the policy; and that is the only reason that I have advanced the argument here. I have gotten it from the *Belt Casualty* case.

The Court: Is there any objection to resuming at 1:30, gentlemen?

Mr. Stanbury: None at all, your Honor. We will finish this case today, I take it?

The Court: Yes. Court will be in recess until 1:30.

(Whereupon, a recess was taken until 1:30 o'clock P. M. of the same day, Friday, June 13, 1947.) [54]

Los Angeles, California, Friday, June 13, 1947, 1:30 P. M.

The Court: Let me hear from Mr. Stanbury on the Gilbert situation.

Mr. Stanbury: Yes, your Honor. Your Honor, the point that I make is very definitely stated in my first brief.

The Court: Let me ask you, if I may?

Mr. Stanbury: Yes.

The Court: As I understand your point it is that Gilbert is an assured of the United Pacific policy?

Mr. Stanbury: Yes, your Honor.

The Court: Gilbert is not an assured under the Ohio Casualty policy; that the employer of Gilbert is compelled to respond and the employer of Gilbert may sue Gilbert?

Mr. Stanbury: Yes, sir.

The Court: To recover the damages caused to the employer through Gilbert's neglect; and that if it secured a judgment against Gilbert, the United Pacific would be compelled to respond?

Mr. Stanbury: Yes, sir.

The Court: But isn't there one gap lacking in that chain? Before United Pacific would be compelled to respond, it would have to be for a loss which United Pacific had agreed to indemnify him against?

Mr. Stanbury: That is correct. [55]

The Court: And he could only be liable—or, rather, United Pacific could only be liable, couldn't it, if the basis of the claim under the policy were that Gilbert had a claim back against the claim assured paid?

Mr. Stanbury: No, sir; I disagree with that, your Honor. Gilbert is admittedly an assured of the United Pacific. That is stipulated. They agreed to that.

Therefore, Gilbert has rights under that policy as an additional assured, there isn't any question about that.

The Court: All right; let us assume that.

Mr. Stanbury: All right.

The Court: And what does the policy cover?

Mr. Stanbury: It covers any loss that Gilbert sustains as the car driver, that is, any liability imposed upon him.

The Court: Does it cover Gilbert's liability to his employer?

Mr. Stanbury: It covers his liability to anybody whatsoever, your Honor, because it does not specify. It is a policy to indemnify the assured against loss sustained through any activity. This being comprehensive, if it were the automobile, it would be damage to an automobile. It is a situation that is exactly the same—and I stand square-footed on this proposition and I am satisfied I am on solid ground—it is exactly the same as if Gilbert had a third insurance policy here in another company and he ran over a child or in any other way incurred a liability, his [56] company would have to indemnify him. United Pacific is that company.

Now, I grant that there is a link missing here unless, in the discretion of the court, the court decides to bridge it, because this is an action in which the parties want their rights completely declared and there is authority for your Honor jumping that gap.

The gap would be that, technically, the United Pacific would be entitled to sit back and say, "We will not pay until our assured, our admitted assured, Gilbert's liability has been established by Judgment." They have that right. They could do the same thing here if they wished and say, "We won't pay any claim until our named as-

sured has had a judgment against him." And so could the Ohio Casualty do likewise.

But in this case it is admitted—it is in a written stipulation—our very presence here proves that the fact that would be established by a judgment against Gilbert does exist, namely, Gilbert did cause this accident through culpable negligence. And it is an idle act to say to Ohio Casualty Company, as the subrogee of this named assured, "You first go to Nebraska, serve Gilbert, and get a judgment against Gilbert, and then we will have to admit what we now admit, anyway, namely, that our assured Gilbert caused this loss." [57]

The Court: All right. Let us assume that Ohio Casualty is subrogated to the rights of the employer against the employee and that the employee is an additional assured under the policy issued to Page by United Pacific. United Pacific is compelled to pay, compelled to pay first on account of Page, isn't it?

Mr. Stanbury: I do not know which would be first there paying off. They have got a named additional assured.

The Court: All right. They are compelled to pay on account of Page on this accident because Page is sued, isn't he?

Mr. Stanbury: That is right.

The Court: They are subrogated to Page's rights. An agent of the partnership, for whom the partnership is liable, caused the loss to Page; so United Pacific would have a cause of action, would it not, subrogated to the claim of Page against the partnership, for which Ohio Casualty Company would be called upon to respond?

Mr. Stanbury: No, sir. That, if your Honor please, is confusing the two issues, I think. As between the



named assureds I grant and concede, for any cause of action I have before the court or right now at San Luis Obispo, if your Honor does not care to take up the Gilbert matter, which I think should be taken up—

The Court: Let us take it up. Let us plot it. [58]

Mr. Stanbury: What is that?

The Court: Let us plot this thing. That is the way to do it.

Mr. Stanbury: All right.

The Court: Suppose this court says: There is coverage here by both parties, by both insurance companies, up to \$10,000 and that they shall each contribute one-half that amount. The United Pacific pays \$5,000, the Ohio Casualty pays \$5,000; so their loss, each is \$5,000, obviously, isn't it?

Mr. Stanbury: Yes, sir.

The Court: So Ohio Casualty says: We are insurance carrier for the employer for the employee's negligence, we are subrogated to the rights of the employer so we sue the employee. You sue the employee. You procure a judgment and then sue the United Pacific on that judgment. Meanwhile United Pacific's counsel is at work and says, "Well, we have paid out \$5,000 on behalf of our assured Page. This partnership was using Page's automobile. The negligence of the partnership's employee caused our loss. The partnership is responsible for the negligence of the employee and we are subrogated to Page's rights. We sue the partnership and recover a judgment against the partnership for the negligence of its employee and sue Ohio Casualty on that judgment. Don't you end up just where you were? [59]

Mr. Stanbury: No. I will tell you why we do not, your Honor. Because at the bottom of the pile every step

of the way is Gilbert. If they were a subrogee against the Ohio Casualty Company for a loss imputed by Gilbert, they would have to either collect from Gilbert or from Gilbert's insurer, and they are right back in their own pockets. That is the answer.

The Court: Let us assume for the moment that that could be true if you had jurisdiction over Gilbert and could procure a judgment against Gilbert. But the judgment that you are going to call upon United Pacific to pay is a judgment against Page, isn't it?

Mr. Stanbury: That is right.

The Court: All right. Now, they are subrogated clearly to Page's rights, aren't they? Isn't that partnership liable to Page as owner of that vehicle for the damage caused him through the negligence of its agent?

Mr. Stanbury: Your Honor, I do not believe so. I sincerely do not believe so.

Now, I did not intend to join issue on that matter, because I tried to keep the issues as narrow as I could here. I do not believe that one partner can sue a partnership of which he is a member for damages; and I believe that is the import of the case in 45 Cal. App. (2d), which is not the Consolidated Shippers, but *Park v. Union Mfg. Co.*, 45 Cal. App. [60] (2d), cited by United here, because the partnership liability is joint and several. And I don't think they could—

The Court: Upon an accounting, upon an accounting. However, the form of remedy is there—

Mr. Stanbury: Let us concede it for the moment, your Honor. Let us concede—

The Court: —because, would not Ohio Casualty stand to pay the partnership whatever the partnership was out?

Mr. Stanbury: That is correct.

The Court: And the question would be: Could Page recover from the partnership?

Mr. Stanbury: Well, your Honor, suppose he could. The partnership turns right around and collects from Gilbert. That is the overwhelming point that I have to keep insisting on. At the bottom of every automobile accident for which anyone has to pay there exists the original basic tortfeasor.

The Court: But you are liable to have the dog chasing his tail here. There is only \$5,000.00 on either side.

Mr. Stanbury: No, sir; not as to Gilbert, your Honor.

The Court: Your company is out \$5,000—correct?

Mr. Stanbury: My company is out \$5,000 for—

The Court: In the San Luis Obispo County action, suppose it is \$10,000?

Mr. Stanbury: Yes, sir; that is correct.

The Court: All right; United Pacific is out \$5,000. [61]

Mr. Stanbury: That is right.

The Court: Your company tries to recover from United Pacific \$5,000 through its subrogation to the partnership and a claim through Gilbert at the same time.

Mr. Stanbury: That is right. They can't claim through Gilbert.

The Court: No. Your company is claiming through Gilbert.

Mr. Stanbury: That is right.

The Court: Ohio Casualty.

Mr. Stanbury: Yes, sir.

The Court: At the same time, in this chess game or military maneuvering, probably more correctly, the forces of United Pacific take out and, through Page against the

partnership, to recover their \$5,000, recoup their \$5,000 from Ohio Casualty.

Mr. Stanbury: That is right.

The Court: And if you did not meet head-on along the way, to avoid a plurality of actions in a court of equity would you not end up by being at a great deal of litigation and each of you satisfying and collecting a judgment for \$5,000?

Mr. Stanbury: No, sir. I am satisfied that I can demonstrate the contrary. Does the court have any objection to my charting it on this blackboard?

The Court: No. I think it is helpful to graph it.

Mr. Stanbury: I think we can do it off-hand here. [62]

The Court: Bear in mind that you do not have any judgment against Gilbert.

Mr. Stanbury: I know that, your Honor. I grant this court in every way is empowered to say to go to Nebraska and get another judgment.

The Court: No, no. I mean by that, if United Pacific comes and pays, it is going to pay for the account of Page, and not for the account of Gilbert.

Mr. Stanbury: Well, that is correct up there; that is right. Unless we take the broad vision and say we are looking to end this chain of litigation completely, that is right; we are going to have to settle up 50-50 at San Luis Obispo.

(Diagramming on blackboard): We have United Pacific, and all its rights and obligations are traced through Page and Page dba Mission.

The Court: Why don't you just leave Mission out of it, if it will help any?

Mr. Stanbury: All right.

The Court: Let us just take Page.

Mr. Stanbury: All right. Then Ohio Casualty—

The Court: Unless you think it helps.

Mr. Stanbury: Well, I think it won't hurt any; it won't confuse anything.

The Court: All right.

Mr. Stanbury: Then we have Ohio Casualty and McKeon and [63] Page, and here I do not need Mission but I will put it in to be consistent.

The Court: Is that the same Mission that is in the other one?

Mr. Stanbury: No; it is Pacific. It should be "dba Pacific." Then we have down here where both parties are liable for what he did. We have Gilbert, and then through Gilbert we have these people who are named—what is their name?

Mr. Brown: Echols.

Mr. Stanbury: Echols, all right.

The Court: Now, wait just a minute. That won't do because Gilbert's liability in that chain is the same as McKeon and Page's liability.

Mr. Stanbury: Well, I will put an arrow up to here. It is a joint and several liability all the way around; so I will make the arrows run everywhere they ought to. Echols can by-pass Gilbert if they want to.

In other words, Gilbert is liable to everybody here after certain conditions precedent are satisfied, that is, for a judgment as obtained against him. These people do not have to sue him; they can by-pass him. And both the owner's liability and both the liability of Page here and the United Pacific, as an owner, and ours as a principal, is both direct and primary as to everybody but Gilbert. [64]

The Court: Echols has in effect by-passed Gilbert, hasn't he?

Mr. Stanbury: That is right; and they can.

The Court: All right; that is \$5,000 each.

Mr. Stanbury: Yes, sir.

The Court: \$5,000 against Page and \$5,000 against McKeon and Page?

Mr. Stanbury: Yes. Now, if we assume—I am not certain I am right on this; I may be wrong—if we assume that McKeon and Page can sue through an accounting or something else, and maybe they can, then we have a liability running over here in favor of Page and Page, but I am trying to—

The Court: There is only one Page, isn't there?

Mr. Stanbury: There is only one Page. But let us take Mission out. Just as the court said in the first place, it is confusing to have them in there. Just Page and Page and McKeon of McKeon and Page.

The Court: All right. Then Page could recover, at most, under that assumption \$2,500, because he would be suing himself.

Mr. Stanbury: That is all. One company would pay half of it. What I am trying to do now—and I am thinking as I go along, because I had not planned a diagram—I am trying to put an arrow in here pointing a liability. The arrow head [65] points liability to everybody who has any claim against anybody else here. I think I have it.

We are assuming Page can sue or get an accounting.

The Court: We have to have a liability from Gilbert up to United Pacific.

Mr. Stanbury: That is right; we have to have that up there. We also have to have one from Gilbert up to McKeon and Page.



The Court: Not Gilbert to Page, now; from Gilbert direct to United Pacific, because it does not go through Page, does it? If it were through Page, that would make a different story.

Mr. Stanbury: No. These are subrogators and they only can trace through their assureds, but I will show a direct liability here.

The Court: Because Gilbert is a "named assured" or is an additional assured of United Pacific—correct?

Mr. Stanbury: That is right; and therefore I can't put this arrow in here.

The Court: I think you can. You can't put it through Page, but you can put it direct from Gilbert through United Pacific, can't you?

Mr. Stanbury: Yes, but they insure Gilbert.

The Court: You are leaving out the insurance for a moment. [66]

Mr. Stanbury: When your Honor asked me to put an arrow straight up to United Pacific and I did it, I overlooked the fact that United Pacific, since it insures Gilbert, has a liability to Gilbert but Gilbert is not liable to reimburse or permit a recoupment by his insurers.

The Court: Yes; that is what I intended the arrow to be. You probably have the point wrong.

Mr. Stanbury: My point should be the other way. All right. And then, of course, there are reciprocal arrows that must come down from Ohio to Gilbert and the reciprocal arrow—there is one already from McKeon and Page. And just as we have the same thing from United Pacific, we also have a right of subrogation through Ohio Casualty when the losses occurred.

The Court: Ohio Casualty recovers from Gilbert?

Mr. Stanbury: That is right.

The Court: The Echols recover from McKeon and Page, recover from Ohio Casualty through McKeon and Page.

Mr. Stanbury: That is right. Both these companies, as I see it, are in the same position regarding subrogation, except with the United Pacific insuring Gilbert and Ohio not insuring Gilbert, United Pacific obviously cannot recover back from Gilbert nor an insurer be subrogated against his insured.

The Court: Should we not reverse the arrow between [67] United Pacific to lead up in the first instance?

Mr. Stanbury: That is right.

The Court: When we start back the other way let us use a snake line.

Mr. Stanbury: All right, that is right. Have I got any that are wrong now?

The Court: Well, that one from United Pacific down to Gilbert.

Mr. Stanbury: Yes. What is that snake line to indicate?

The Court: Let us see what we have up to this point. You have from Echols to Page through United Pacific, don't you?

Mr. Stanbury: Yes, sir.

The Court: That is the original recovery?

Mr. Stanbury: That is right.

The Court: From Echols through McKeon and Page to Ohio Casualty.

Mr. Stanbury: Yes, sir.

The Court: They by-pass Gilbert, so that line from Echols to Gilbert goes out, doesn't it?

Mr. Stanbury: Yes, except that my lines are supposed to show every conceivable liability here. As the thing now stands, that is just exactly right; that has happened.

The Court: That is what our situation is, isn't it?

Mr. Stanbury: That is right. And then we will have to take some other arrows out, because we do not have any actions [68] pending now.

The Court: Let us take those intermediary arrows out for the moment.

Mr. Stanbury: All right. This clarifies it very much, and this comes out.

The Court: Now you are going to have a different kind of arrow. This is the subrogation arrow that goes from Ohio Casualty through McKeon and Page to Gilbert, doesn't it?

Mr. Stanbury: Yes; it does.

The Court: To Gilbert, and from Gilbert direct to United Pacific.

Mr. Stanbury: Yes, sir.

The Court: Not through Page but direct to United Pacific.

Mr. Stanbury: Yes, sir. Now, the point that I am making, your Honor, is that no suit can be diagramed or outlined between anybody here who has any right to sue anybody else, on this board, that won't wind up on Gilbert.

The Court: All right. Let us now assume for the purpose of this discussion that after United has paid out \$5,000 and Ohio Casualty has paid out \$5,000 to Echols, they set about to recoup whatever they can recoup. Ohio Casualty is claiming a right of subrogation of McKeon and Page through Gilbert; we are assuming jurisdiction all the way through wherever they have to go; they sue him, recover [69] a judgment, and sue United Pacific on that judgment.

Mr. Stanbury: Yes, sir.

The Court: All right; there is one. So Ohio Casualty at the moment appears in the prospect of recouping the \$5,000, doesn't it?

Mr. Stanbury: Yes.

The Court: United Pacific is not idle. What can United Pacific do? They set out that they paid \$5,000 out for the account of their assured Page. They are subrogated to what claim Page may have to the extent of \$5,000.

Mr. Stanbury: They are.

The Court: Any claim.

Mr. Stanbury: That is right; they are.

The Court: They stand in Page's shoes to the extent of \$5,000.

Mr. Stanbury: Yes, sir.

The Court: So they sue the partnership as claiming subrogation to Page's rights against the partnership, upon the theory that an agent of the partnership caused the loss of Page. Now, how much can Page recover from the partnership, \$2500?

Mr. Stanbury: Let us say that; yes, sir.

The Court: All right. Then United Pacific recovers from McKeon and Page \$2,500 for which Ohio Casualty is compelled to respond. [70]

Mr. Stanbury: Yes, sir.

The Court: So the net result is that United is out \$7,500 and Ohio Casualty is out \$2,500.

Mr. Stanbury: Up to this point, absolutely.

The Court: All right. Now, where do we go from there?

Mr. Stanbury: We go from here: Every time United Pacific throws a loss on Ohio as a result of what Gilbert did, we get after Gilbert, if he is uninsured, or against

whoever insured him, whether it be General Accident, Pacific Indemnity or whoever it is. And when we do that in this case we find we are back with our friend United Pacific. This is the bottom and end of every circle we start on, your Honor. It is true, if we forget that Gilbert is the bottom, every tort claim, every loss is going to sink until it gets down to this line below the exhibit. We can go around and around.

But here are actions inter se, because United traces through Page, he traces through McKeon and Page, and both of them have an absolute cause of action against Gilbert. But, unfortunately for the United Pacific, it happens to be Gilbert's fire boom.

The Court: Your answer to that is that Ohio Casualty, even if compelled to pay the claim of Page against McKeon and Page or United as subrogee of the claim, that the Ohio Casualty can turn right around and be subrogated to the [71] rights of McKeon and Page against Gilbert for that loss, and, recovering a judgment against Gilbert, United Pacific would be called upon to respond within the limits of their liability to Gilbert, that is, within the limits of the \$10,000 liability?

Mr. Stanbury: That is exactly it. In other words, if we stop with Page suing McKeon and Page—and we don't—while we are chasing Gilbert, if we allow ourselves to be open to execution, we have paid off United Pacific on what McKeon and Page did to Page.

The Court: Under that theory, then, I was in error in my last statement. As insurer of Gilbert, the only limit of liability of United Pacific would be the limits of the policy.

Mr. Stanbury: Limits of the policy.

The Court: I was referring to the statutory limits.



Mr. Stanbury: Yes; that is right. In other words, momentarily the parties will be as they are up in San Luis Obispo, cut right across the middle of the litigation.

We would not yet have had time to chase Gilbert, any more than we have now. And my argument why in this action for declaratory relief we should go to the end of the line now is to avoid that very circuit whereby both of these insurers, through their respective insureds, discharge their original present liability to Echols, and then Ohio Casualty, through McKeon and Page, have to sue Gilbert and then sue [72] United Pacific.

Your Honor has the authority to make that circuitry of action, with the loss of money in attorneys' fees and the wasted efforts unnecessary right now by looking at reality here.

I have cited your Honor one Washington case which holds that it is not necessary, under certain facts, although the policy says the judgment shall first be obtained against the assured, that a judgment be obtained; and that finding was made upon the grounds that the evidence showed the settlement made by the assured was a proper and advisable settlement based upon a legal liability, even though it had not been reduced to judgment.

In this case we have stipulated in writing, and, if we had not, the implication would be there inescapably, that this was the man responsible for every loss anybody on this board is going to have; and, to say, "Well, although United Pacific concedes it right here in this action for declaratory relief, nevertheless, Ohio Casualty should pay out money to Echols, go to Nebraska to get a judgment against Gilbert, and then on that judgment sue United Pacific" is a terrible circuitry of action.

The Court: What you are saying, though, laying aside those equitable considerations of court procedure,



the effect of your argument is, isn't it, that anything that Echols may [73] recover by reason of Gilbert's conduct, to the extent of the limits of United Pacific's policy, United Pacific must respond to it.

Mr. Stanbury: That is right.

The Court: On the theory that anything within the limits of United Pacific's policy Ohio Casualty may recoup on the theory that they are subrogated to the employer's rights against the negligent employee who, in turn, is insured within the limits of the policy of United Pacific?

Mr. Stanbury: That is exactly it.

The Court: So the crucial question is: Is Gilbert also insured with Ohio Casualty?

Mr. Stanbury: Yes, sir; that is the crucial question in this case, because, as we concede that up at San Luis Obispo, we have a joint liability up to twice the minor policy.

The Court: Under your theory also, then, there are two recoveries here as to the full extent of United's policy—

Mr. Stanbury: As to the two main assureds that is right.

The Court: Yes. Of course, I am assuming your contention with respect to Gilbert.

Mr. Stanbury: Yes, sir.

The Court: With respect to the partnership of McKeon and Page and with respect to the Ohio Casualty, coverage of the employer, you say? [74]

Mr. Stanbury: Yes, sir.

The Court: And with respect to United Pacific's coverage of the employee, it is your contention that there is a duplicate insurance here, double coverage, a coverage by both the insurance companies, United Pacific and Ohio

Casualty, to the extent of the maximum limits of United Pacific's policy?

Mr. Stanbury: Yes, sir.

The Court: What do you say to that, Mr. Brown? I do not care to have you repeat what you said with respect to Gilbert being an additional assured of Ohio Casualty's policy, unless you have something further to add.

Mr. Brown: Not at the moment, I do not, on that point.

The Court: But with respect to the route of liability here.

Mr. Brown: There is one thing that concerns me about it, your Honor. We are trying Gilbert here and I am wondering if we should. We have been talking all day about Gilbert.

The Court: How can you escape talking about Gilbert as long as you concede that the employer has a claim against the negligent employee for the damage which the negligent employee causes?

Mr. Brown: Here is the reason: Mr. Gilbert is a stranger to this controversy. Mr. Gilbert is not in the State of California.

The Court: I do not think that would matter. [75]

Mr. Brown: Well, I am wondering if it does. I am not taking an affirmative. That is a question.

The Court: If you take that position, that because we have no jurisdiction over Gilbert, then it might end up that this court would have no jurisdiction to determine this controversy. I am beginning to wonder whether the court can bridge all those gaps.

Mr. Brown: So am I, your Honor.

The Court: And give you a decree here.

Mr. Brown: I am wondering if we can decide it.

I am wondering also if the court will not probably feel that the same result should be reached that was reached in Consolidated Shippers. The same thing was argued there as here today. The court disposed of it there by holding and stating that we can't require an injured man to elect as to which of the one or two or more joint tortfeasors he will pursue. No rule requires him to do that. We have to take the case as it exists. We can't say to an injured man, "You must sue the employee." He may sue the employee; he may look to anyone legally responsible to him for what happened.

The Court: That is very true.

Mr. Brown: That is the way it was disposed of in the Consolidated Shippers case.

The Court: How does that help you gentlemen to ultimately dispose of your controversy? The court could rule today that, [76] so far as the immediate controversy is concerned, both of you should undertake a joint defense of the action in San Luis Obispo County, but that really would not settle anything, would it?

Mr. Brown: We are here to have it all settled.

The Court: You are not asking for cost of attorneys' fees in that action?

Mr. Brown: No; we are not, your Honor. We are here to have the entire controversy settled.

The Court: Then must not the court look down the road, so to speak, and down the channel of time and see what will ultimately happen?

Mr. Brown: My answer to that is just what happened in the Consolidated Shippers case. The court there was asked to look, just like your Honor is being asked to look here today. And I will be most happy if your Honor would look at the briefs that were written in that to see how it was argued there, just precisely as it is argued here.

The Court: Was that the situation there?

Mr. Stanbury: No.

Mr. Brown: Harvey there stood in the same place as Gilbert stands here.

The Court: What about the carriers, the insurance carriers? Where did they stand with respect to Harvey? That is the question, isn't it? [77]

Mr. Brown: They stood in the same relative positions almost.

The Court: If the court determines that Gilbert is an additional assured of the Ohio Casualty's policy, then it seems to me that we would arrive at this stage where, as you argue in effect, that both insurers have covered this accident to the extent of the limits of their policies and it would be a question of prorating the liability. But, is not the crucial question: Was Gilbert an additional assured of the Ohio Casualty's policy?

Mr. Brown: We are borrowing trouble that we do not need to borrow.

The Court: How can we escape it?

Mr. Brown: We can escape it by treating it just as the court did in Consolidated Shippers case. Pacific Employers there argued just as Ohio Casualty is arguing here, that whatever it paid on behalf of Harvey because it had insured Consolidated Shippers, it could recover from Harvey and, therefore, from Pacific Indemnity, Harvey's insurer, and the court rejected that.

Mr. Stanbury: If I may interrupt at that point, your Honor, Consolidated Shippers did not have this question before the court in any way whatever. It was a question of two companies insuring the same plaintiff, one as an additional assured under Harvey's policy, one direct. It is not an [78] action for declaratory relief nor for subrogation. It is exactly as if both assureds were with the

same company here, were suing the company—no; that is wrong. It is as if these assureds were suing these companies and the companies, between themselves, without any subrogation action, without any declaratory relief action whatever, were trying to avoid the obligation which we both admit having in San Luis Obispo. That is why I said in my second brief their argument here is exactly opposite from what it is on the other phase of the same problem. Ohio could make the same argument. We contend we are joint up at San Luis Obispo, and that is your Consolidated Shippers case. The immediate liability up there has nothing to do with subrogation whatsoever; it is not involved in any way whatever. After the court gets through with that Consolidated Shippers, the insurance company for the employer could turn right around and sue that driver and collect from his insurance company.

The Court: There is no limitation, is there, Mr. Brown, except the policy limitation—there is no statutory limitation upon the liability of Gilbert, is there?

Mr. Brown: None whatsoever.

The Court: So your coverage of Gilbert is to the extent of the limits of the policy?

Mr. Brown: That is right.

The Court: Hence your coverage so far as Echols is [79] concerned is, again, the limits of the policy.

Mr. Brown: Yes. We are talking here, and at one point a matter of fact should be corrected or stipulated, that we cover Gilbert subject to the limitations contained in the policy, and one of them being that he has other insurance. We have never stipulated, without qualification, that we insured Gilbert in that policy.



The Court: No. I mean from the facts we have before us. But the question is: Can we today determine its liability?

Mr. Brown: My answer is yes. And may I state why?

The Court: Yes.

Mr. Brown: Why borrow any trouble and worry about Mr. Gilbert? We do not need Mr. Gilbert in this controversy at all.

The Court: All right. Let us try to leave him out and see where we get.

Mr. Brown: Very well.

The Court: Where will we be if we leave him out?

Mr. Stanbury: May I answer that, your Honor? May I answer that question?

The Court: Yes.

Mr. Stanbury: If we leave him out, here is what is going to happen: We pay off 50-50 up at San Luis Obispo. And I am not merely repeating myself; I am going further this time. Ohio sues Gilbert, gets a judgment which is *res judicata*. We [80] then sue United Pacific. They admit they insured him. We get a judgment against them. If we want to continue the farce, United Pacific now sues McKeon and Page. We have paid that amount out for the man. Of course, McKeon and Page will have the defense: Well, you insured the man. Then if they are stuck, Ohio Casualty says, "We did not insure Gilbert. We are not going to pay the judgment." The question before that court, way down at the small end of the blanket at the end of the line is going to be the very question before this court now: Does Ohio insure Gilbert? That is the alternative, if the parties are going to stand on their strict technical rights by getting judgments against each other before they do anything.



The Court: If you gentlemen agree that that is the issue and that it should be determined at this time, I will attempt to determine it. I do not see how you can escape ultimately having to deal with Mr. Gilbert, Mr. Brown.

Mr. Stanbury: I concede that is the question as far as we are concerned.

Mr. Brown: We are not begging the issue at all. We feel, for the reasons that I gave your Honor before lunch, that the statute says that an owner is the one named in the policy, the certificate of coverage, and that the Ohio Casualty policy does not limit the coverage to "automobiles owned by." It says, "or operated." [81]

The Court: Now, let us look at that just a moment.

Mr. Brown: We are not afraid of the Gilbert issue and we do not wish the court to get that idea. We are certainly not afraid of the Gilbert issue, but I think we are only borrowing trouble.

The Court: "With respect to automobiles owned by or registered in the name of the Named Assured"—

Mr. Brown: That is not the certificate of coverage. The certificate of coverage is—

The Court: You are referring back to page 5 of Exhibit B?

Mr. Brown: Page 5 of that exhibit. That is issued at a subsequent time and qualifies anything to the contrary in the body of the policy.

Mr. Stanbury: I want to be heard on that if your Honor cares to have any discussion on it.

The Court: Yes. I have your point. But for that provision under "Description of Risk" on page 5 of Exhibit B—just so I will understand your position—but for that, Mr. Brown, would you concede that the extended coverage clause, printed extended coverage clause of the Ohio Casualty policy is not broad enough to cover Gilbert?

Mr. Brown: No, your Honor; because of the operation of law, the partnership theory, the aggregate theory as it exists in the State of California. We have an interlocking of [82] partnerships here, two fictitious names are involved.

The Court: Your theory, then, to interrupt you—

Mr. Brown: Yes.

The Court: Your theory, then, would be what you argue in your brief, that because of Page, because of the status of the partnership under California law, that in effect this automobile being in the name of Page is in the name of the “named insured”?

Mr. Brown: It is owned by them and operated by them, and the statute says that they are the owner being named in the policy (383.5). We are certainly not trying to avoid the Gilbert issue. We are not afraid of the Gilbert issue. We will meet it head on any time. But I think we are borrowing trouble.

We have on the blackboard an entirely different case from the one brought here before the court and the issues raised here by stipulation and by the pleadings.

The Court: What can the court decide that will be of any assistance to you unless the court proceeds to decide what you call the Gilbert issue? Conceding for the moment that the controversy that we have been discussing, the controversy that exists when a judgment is had against Gilbert, is not before this court at the present time; it has not arisen yet and it involves supposing. The court has no business trying to decide, supposing something, under the declaratory [83] relief statute, as it can a live controversy. The actual controversy is the responsibility. That is the live controversy. Is that all you want decided?

Mr. Brown: Yes. We want to know who shall pay Mr. Echols. That is why we are here.

The Court: I think who should pay Mr. Echols is a comparatively easy matter right now, if that is all you wish.

Mr. Stanbury: We are asking more than that, your Honor. We are asking a declaration outright on the whole rights of these parties inter se, and that is asked for by both. We have asked for a declaration of our rights.

The Court: How can I do it, Mr. Stanbury? I have to suppose that something is going to happen and then another controversy arises. I will grant you immediately the desirability of winding it all up at one time, but have I the authority to decide it?

Mr. Stanbury: I am satisfied your Honor has this authority: You can't order any money paid by either party, but you can announce what our rights and duties are, and your Honor can adjudicate who insures Gilbert. And the parties to this action, assuming neither party feels that both do, they at least know what basket their eggs are in and either abide by the ruling of this court or appeal and know what their rights are, without chasing all over Nebraska and suing each other, to come back to where we now are, namely: Who does [84] cover Gilbert.

In other words, your Honor can adjudicate our rights and state what the law would be, what our obligation would be as to Gilbert, and the party affected by that judgment can look at it and decide, if they have not reversed it on appeal, assuming anybody appealed it: Well, we know where we stand now.

The Court: It would be obiter dictum.

Mr. Stanbury: I am sure it is not obiter dictum, your Honor, because we have asked the court to declare, not our rights as to San Luis Obispo, but our rights under the policy as to each other.

The Court: The plaintiff here brings this suit. All the plaintiff is asking for is a determination of the present controversy.

Mr. Stanbury: Your Honor, they use very broad language under this paragraph (b) at the bottom of page 6 and running over to page 7.

The Court: Of what?

Mr. Stanbury: Of the complaint in this action; not Echols' complaint, the complaint by this plaintiff.

The Court: You mean in the prayer?

Mr. Stanbury: The United Pacific prayer; yes, sir.

The Court: Paragraph (b) of the prayer?

Mr. Stanbury: Yes, sir. [85]

The Court: "That upon final hearing hereof, this Court enter a declaration that said policy of insurance so issued by plaintiff does not apply to and cover said accident of January 16, 1946; but that the policy of insurance issued by the defendant, THE OHIO CASUALTY INSURANCE COMPANY, applies to and covers said accident to the exclusion of the insurance afforded by plaintiff;

\* \* \*

I am prepared to rule on that.

Mr. Stanbury: The next part, the part the court is just coming to, if I may be so presumptuous as to state how I interpret that prayer?

The Court: I wish you would.

Mr. Stanbury: It is that the Court decree our obligations at San Luis Obispo and declare our rights and liabilities with respect to the accident, and a finding of this court as to the insurance coverage that Gilbert is squarely

within that prayer and certainly within the power of this court.

The Court: Surely that stops the plaintiff from going elsewhere and claiming this court did not have a right to decide that question.

Mr. Stanbury: I grant that, right now, we have got a joint obligation up at San Luis Obispo. But it is to the interests of both parties to have the other part of the plaintiff's prayer, in which we join answered, that is, our rights with respect to the accident, as your Honor put it, and [86] that brings Gilbert right into the foreground.

The Court: As to the inclusion of the employee Gilbert, the prayer is broad enough to declare and call for the responsibility of a judgment against Gilbert. I suppose that would call for a determination: (1) If United Pacific is responsible for the judgment against Gilbert, (2) Ohio Casualty responsible for the judgment against Gilbert? The determination of that would determine the extent of the coverage of both policies, would it not?

Mr. Stanbury: Yes, your Honor.

The Court: Do you feel that the court has jurisdiction under the issues tendered here to make that determination?

Mr. Brown: We feel that the court has power. The declaratory judgment act is broad, and we certainly do not wish to urge the court that the court does not have the power.

Our position is this: We are not begging the issue, but we feel that it is not necessary to keep trying Mr. Gilbert.

The Court: The only way I could determine that coverage or could have controversy determine the coverage as affecting the judgment against Gilbert, as I see it,



would be to assume that Gilbert is sued in this San Luis Obispo action, which he is, and shut my eyes to what has been said about his disappearance, and assume that, since it has been stipulated that his negligence was the proximate cause of plaintiffs' injuries in that accident, that a judgment will be rendered [87] against him, and then decide the question of who is liable under these policies to respond for that judgment.

Mr. Brown: It is stipulated that Mr. Gilbert has not been served in the State court action, therefore, the State court is without authority to enter a judgment of any kind against or for Mr. Gilbert.

The Court: Do you wish me to decide the controversy under that assumption?

Mr. Brown: Yes.

The Court: The prayer of your complaint is otherwise, isn't it?

Mr. Brown: We are here to have the entire controversy decided. My point is that we are trying—this can be compared somewhat to a man being on trial on a murder charge where the prosecuting witness winds up being tried. We are not here to determine Mr. Gilbert's rights, because he has never been served. Mr. Echols is the injured man. The two companies here are the ones being called on to pay him. If we keep talking about Gilbert, we are bringing into this controversy a question that we do not have.

The Court: If you follow the prayers of both the complaint and the answer, there is a controversy, because both of them seem to assume that judgment is to be rendered in this action in San Luis Obispo County against not only McKeon and Page but against Gilbert. [88]

Mr. Brown: At the time that was prepared, if the court will permit me to say, we did not know whether or



not Mr. Gilbert had been served. It was only until recently that we found he had left the state, and when we checked the service here the Marshal's return stated that he had left the state.

The Court: Let us do it this way, Mr. Brown: Where anyone questions the breadth of the controversy in a declaratory relief action I am inclined to confine it. If you wish to confine it to the complaint in this action, if you wish to confine it to the supposition that merely a judgment is rendered against McKeon and Page in the San Luis Obispo County Superior Court, I will be inclined to so limit it. But that will not decide the real controversy between the two insurance companies here, will it?

Let us take the afternoon recess now and you might think that over. I do not want to borrow any trouble to reach out and to make adjudications that I do not have to make, and particularly over the objection of the plaintiff who is seeking declaratory relief here.

We will take the afternoon recess of five minutes.

(Short recess.)

The Court: Well, Mr. Brown?

Mr. Brown: We have no objection, your Honor, to the court deciding all the questions that the court feels should be decided in this case. We brought the action and we do not [89] wish to narrow the issues. My point was perhaps more of argument rather than a statement of a desire for the issues to be narrowed.

Mr. Stanbury: Your Honor, I have not been heard on Gilbert orally here and I do not want to waive it if your Honor cares to hear about it.

The Court: I want very much to hear what you have to say about it. If there is anything in addition to what has already been stated in the briefs, I would like to hear it.

Mr. Stanbury: I have this to say, your Honor: The court says I should not repeat anything that is in the briefs.

The Court: I do not wish to limit you.

Mr. Stanbury: No. I have this to say:—

The Court: My present inclination, I will tell you frankly, is that Gilbert is covered by your policy.

Mr. Stanbury: On what theory, your Honor, and I will direct myself to that?

The Court: Well, upon this theory: He is an employee of a partnership composed of a man named Page in whose name, but as an individual, the vehicle happened to be registered, and the partnership could only operate the vehicle through employees. I do not suppose it is contemplated that the partners would be the only ones who would drive it?

Mr. Stanbury: No, sir.

The Court: Being an employee of a partnership in whose [90] name the vehicle was registered, it seems to me, should bring it within the coverage of the policy, laying aside the declaration of the company as to exemption from coverage of Page's liability outside the activities of the partnership.

Mr. Stanbury: Laying that aside?

The Court: Yes.

Mr. Stanbury: The court does not care for me to discuss that part?

The Court: I have laid it aside in my determination, upon the ground that that was a warranty addressed to an individual and was not a part of the policy as originally issued and is not intended to modify or amend the policy.

Mr. Stanbury: Your Honor, the important thing to bear in mind here is the fact that, although an insurer insures its named assured for everything that it does, it does not have to insure the driver. In fact that is not an uncommon type of policy, to insure my liability everywhere, but not individually for people driving my cars. Is your Honor aware of that type of insurance policy?

The Court: Yes.

Mr. Stanbury: All right. In other words, the mere fact that a man is driving an assured's vehicle and the insurer insures that named assured, the employer, is in no way any reason for supposing that the policy insures the driver as well. And that question can be answered only by [91] looking to the terms of the policy, and when the terms are clear and unambiguous they are, of course, to be followed. And the language of the Ohio policy, in order to determine whether we insured Gilbert or not, we have to look at the definition of "additional assureds." We can't find that he is an assured of this policy merely because we insure his employer and have to answer for him.

The Court: Oh, no, no.

Mr. Stanbury: When he is on duty. You see, the difference would be this: That if he is an additional assured, we have to pay for him when he is joy-riding; but if we are calculating a policy and a premium on what his employer is liable for, then we do not cover him at all. And it is a big practical difference; it is not a technicality.

If this man took a car without any permission whatever, if he ran away as that bus driver did and took a trip to Miami, Florida with the company's bus, if that driver were an additional assured in that policy and he had an accident at Atlanta, Georgia, the company would pay,

whereas they would not have to pay if they merely insured the bus company, because the man is not on duty and does not even have permission to make the trip.

So it is a very important thing. It is not merely a case of saying that, because we insure the employer, we must insure the employee. But the question is: Did we ever [92] embrace this man as an additional assured under the policy? And we have to look to the definition of "additional assureds" here which is covered in our stipulation.

We will find the page of our stipulation in which that is quoted. Yes: at page 4 of the stipulation, your Honor. My copy is underlined. It is paragraph 6 (b):

"That the policy issued by the Ohio Casualty Insurance Company provides coverage, in addition to the named insureds to, inter alios, 'with respect to automobiles owned by or registered in the name of the Named Assured \* \* \* any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured.' "

That is the only provision in this policy that can make Gilbert an assured.

The Court: That is the provision I have in mind.

Mr. Stanbury: Yes, sir.

The Court: I was reading it from the policy, the full provision, the first paragraph of the "Automobile Extended Coverage" provision.

Mr. Stanbury: Yes, sir. So that if this man Gilbert is an assured of Ohio Casualty as distinguished from his employer, he must have been driving an automobile owned by or registered in the name of the named assured. That is the [93] whole horizon of the definition.

The Court: All right. What does that mean within the meaning of the policy?

Mr. Stanbury: That is right, your Honor. When we turn to that we know immediately by stipulation that it is not a vehicle registered in the name of the named assured. We have a stipulation that the car was owned by United's assured. So now the only question remaining is whether this was an automobile owned by the named assured, which is McKeon and Page. If it were not for the—

The Court: May I interrupt you there?

Mr. Stanbury: Yes, your Honor.

The Court: Would you say that McKeon was a named assured of this policy?

Mr. Stanbury: Yes, sir.

The Court: Would you say that Page was a named assured of this policy?

Mr. Stanbury: Yes, sir; as "McKeon and Page" only, however. If your Honor will notice that the endorsement—our stipulation, page 3, paragraph 4 (b)—does your Honor have it before you?

The Court: Yes.

Mr. Stanbury: The Supreme Court has held in two cases—your Honor is familiar with *National Auto v. Industrial Accident*, 11 Cal. (2d)—very specifically that, although [94] there is no such thing as a partnership entity for insurance purposes, it may be created by contract of the parties, and in those cases the clause—well, I would like to get the very language of the policy. This is not our policy. Our policy goes much further. But in the *National Auto v. I. A. C.* in 11 Cal. (2d) 689, the clause



which was held effective in creating a partnership entity for insurance purposes was this one:

“If the policy is issued to an individual, it shall cover only his liability as an individual employer and not any liability as a member of a co-partnership or any other organization.”

And the Supreme Court held that the parties had a perfect right to make that distinction. The Supreme Court cited the California cases, that there is no partnership entity in California, and therefore that a policy issued to any individual covered him as a partner, the very argument made by United here, and held those cases and those rules have no application in an insurance policy where the parties contract to separate them.

If the parties did not have a right to do that, consider where we would be. First, consider the situation of the man with a variety of business enterprises such as Page. Page went to one company and said, expressly, insure me doing business as this and doing business as that and the [95] other thing and he got a premium on that basis.

Now, he has another activity where he operated a lot of vehicles, different places of business, and he has got a home, and this is a comprehensive policy. He has got obligations there and he has got private cars. He goes to another insurer, the United, and he says, “Insure me as an individual and insure my business here and my business there.”

Now, if it were not for the ruling of the court in these cases in 11 Cal. (2d) that parties had a right to do that, no insurance company could write an individual liability policy on a man with many activities, without covering him in all his activities. It could not insure William Wrigley without incurring liability for any business that Wrigley



operates, even if they expressly say, "We are insuring you only as an individual and not in connection with your businesses."

So the question here is whether or not the Ohio policy distinguishes between Page here and Page there, and I submit that more careful language could not be devised by us here, now, with this case in mind.

The Court: This policy is not tailored to Page's situation. That is a printed clause, isn't it?

Mr. Stanbury: No, sir. In the National Auto case it was printed. It just automatically appears there. In ours it is typed. Ours is tailored to Mr. Page, your Honor. [96]

The Court: Where is it typed?

Mr. Stanbury: The pages on my exhibits are not numbered. I have one now that is numbered, and your Honor will find it on page A-2 or page 9, isn't it? Page 9 of Exhibit B, and it was absolutely tailored expressly for this assured, typewritten, and reads this way, if your Honor has it before you.

The Court: I have a printed policy here, Exhibit B. It is Exhibit B and it runs pages 1, 2, 3, 4, 5 to 11.

Mr. Stanbury: Page 9 is the one. Mr. Somers is holding a facsimile of it.

The Court: Page 9?

Mr. Stanbury: Yes, sir. If it is left out of the court's copy, why, that is by inadvertence.

The Court: Yes; I have it, page 9.

Mr. Stanbury: All right, sir. To read that aloud:

"It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposure or activities; or

his liability in connection with other business activities as an individual, a member of other partnerships, a receiver, a director, or an executive officer of a corporation."

Very pointed language. [97]

The Court: But this automobile was being used in this particular business, was it not, or this truck?

Mr. Stanbury: That is right.

The Court: The question is whether it is owned by the partnership within the meaning of the policy, isn't it?

Mr. Stanbury: That is right. Now, your Honor, if this clause does not modify the "additional assured" clause originally, consider for a moment what is going to happen.

Can we start out on solid ground with this premise that, on the basis of the Supreme Court decisions of this state, parties have a right to insure Page as dba Pacific and exclude him as an individual, or doing business as Mission? That is absolutely a legal right we have, as we made this contract under the California laws. Now, if this modification does not apply to the whole policy, then we would have this anomalous situation:—

The Court: I would not question but what it would apply to the entire policy; but I would question whether it has the effect of changing this printed provision as applied to the situation in the case at bar. We have to construe this language in connection with all the printed and typewritten language of the policy, do we not?

Mr. Stanbury: Yes, sir.

The Court: And what is the purpose of the "extended coverage" clause? The gist of the extended coverage clause [98] is, isn't it, that the use is with the actual per-

mission of the named assured? That is the thing that the insurance company is interested in, isn't it; and that is the thing that would limit the liability, would preclude liability from the joy-ride in the case you mentioned, would it not?

Mr. Stanbury: Well, no, it would not; because that is the very point I am going to make. We would be then in the anomalous position, which certainly neither Page nor we intended, of insuring the criminal joy-rider, although we expressly exclude Page.

The Court: I do not quite follow you there under this clause. I recall in the United Pacific policy—

Mr. Stanbury: They do not have that limitation. And I am not making any point—

The Court: "Definitions" in Exhibit A, page 2, United Pacific policy, definition of "insured," subdivision (4) says: "any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided actual use is with the permission of the named insured, \* \* \*"

Mr. Stanbury: They go further, you see. They say "additional assureds are people driving hired automobiles."

The Court: "Owned or hired."

Mr. Stanbury: "Owned or hired." We do not.

The Court: You say "owned or registered." [99]

Mr. Stanbury: That is right.

Consider for a moment where we will be—and I ask your Honor to carefully consider this because it is a vital point—consider where we will be if this page 9, special policy endorsement, does not modify, does not apply to the additional assured definition as well as to the rest of the policy.

The Court: Oh, it applies to the entire policy but I do not see where it limits. It seems to me the question is: Was this an automobile owned by a named assured?

Mr. Stanbury: That is right.

The Court: Within the meaning of the policy.

Mr. Stanbury: That is right.

The Court: Is not that the question?

Mr. Stanbury: That is correct.

The Court: I do not see where this endorsement over here has anything particularly to do with it.

Mr. Stanbury: Well, it has this to do with it: The endorsement says we are not taking coverage for Page in any but his specific activities.

The Court: That is true, but this activity we are dealing with here was certainly an activity contemplated by the policy, because this man was on the business of this partnership of McKeon and Page, was he not?

Mr. Stanbury: Yes. [100]

The Court: And he was using the automobile or truck with the express permission of McKeon and Page. Now, the question is: Did the policy intend to exclude or, to put it another way, did the policy intend to cover this additional assured, an employee of the partnership, driving the truck which was devoted to the business of the partnership and happened to be owned or registered in the name of one of the partners instead of the partnership.

Mr. Stanbury: Well, your Honor, it cannot be, without the most absurd results. I will come to those results in just a moment.

First of all, we start out this premise: You can contract a partnership entity; no question about that. Our policy describes Page doing business in two different activities. If we stop there, we would run afoul of the rule

that you can't split an individual up, the rule of the cases that counsel relies on for the United Pacific, if there is no partnership entity, but you can contract.

Now, we go further and we say that we are insuring Page. We are not insuring Page as the owner of this automobile. We have said it very plainly. We are not insuring Page in his personal non-business exposures or his liability in connection with other business activities as an individual.

We have carefully made it plain that our named assured is—who?—Page doing business as Pacific Laundry and Dry Cleaners. You could not use any more careful language. [101]

The Court: This liability is sought to be imposed upon Page in his capacity as a partner with McKeon in that business.

Mr. Stanbury: And we cover him; we cover him admittedly.

The Court: But this endorsement says that the coverage shall not apply to the liability of Page—does not stop there—"a partner," "Page, as a partner"—Page, a partner of the partnership, I suppose. For what? "For his personal non-business exposures or activities;" this is not one of those?

Mr. Stanbury: Yes; it is, your Honor.

The Court: Is this a personal non-business exposure.

Mr. Stanbury: No. Pardon me. The next clause is the one.

The Court: "or his liability in connection with other business activities as an individual, a member of other partnerships, a receiver, a director, or an executive officer of a corporation."

There is a possibility that he might be excluded by the provision "or his liability in connection with other business activities as an individual." That would be the only possibility.

Mr. Stanbury: That is it, your Honor; that is precisely it. [102]

The Court: What are his "other business activities" that are involved here. the ownership of this truck?

Mr. Stanbury: Yes, sir; his ownership of this truck. Look what this policy says. It says that the coverage shall extend to persons driving any car owned or registered to the assured.

The Court: If that were typed in the policy, but that is part of your printed form. It has the same relative application as the definitions under the United Pacific form, doesn't it?

Mr. Stanbury: Yes, sir. But the typing—

The Court: It is a familiar provision in all automobile policies, is it not, in one form or another?

Mr. Stanbury: That is right. And we have gone ahead and hammered it down with typewriting. In other words, to show what we mean with his truck we have hammered it home with typewriting.

And let us just take the policy. We say additional assureds are persons driving any car owned or registered to the assured. Let us look over to the assured Page. We find Page doing business as in three capacities, and nothing else. If we stop right there, this car is not owned or registered to an assured as named. But at that point it would be argued that we encounter the rule in this state that there is no partnership entity, which would be ridiculous between two [103] insurers when the other in-



surer, who is a party to this case, is the recipient of a premium collected for other risks that they claim we took.

In other words, we say here is a man with six personalities, he comes to us for insurance and we insure him for one, two, and three, and we call him by those three aliases; he goes over to our opponent, who is making this argument against us, in his fourth, fifth and sixth aliases. He says, "You insure me." They take a premium for that after taking out a certificate of what they are insuring and they collect them; and then they come around and say, "Look here, although we took him as fourth, fifth and sixth and have been paid, you took him as one, two and three. We maintain you also took him as four, five and six."

If we stop there, your Honor, we have an anomalous situation and a ridiculous situation when the argument comes, not from the injured party, but from the insurer and premium collector from the other half of this split personality.

But we go further; we bring ourselves right within this Supreme Court case by in effect typing on the policy typing on it showing we have thought about it, showing that the certificate contemplated the risk, just as Page did. Page went to see the other company to get his other insurance. This is no technicality. The man deliberately did it.

The Court: Didn't your company, the Ohio Casualty, [104] insure the risk, the motor vehicle risks of this business of McKeon and Page?

Mr. Stanbury: Positively. We owe it to them.

The Court: Was not the operation of this truck by this man Gilbert one of the business undertakings of that partnership?

Mr. Stanbury: Why, absolutely, your Honor. But suppose Page and McKeon were dead and someone was suing Gilbert. That is what I am now talking about. Our partners are dead. They are now suing Gilbert. They have got to show that Gilbert is an assured under this policy.

And what do they have to do? They have to go and show that the car was owned or registered to the assured under this policy, and it is a policy that we have an absolute right, as the assured asked us, to split his person-ality.

The Court: There is no question about it. But the assured is named as "R. H. McKeon and G. B. Page dba Pacific Laundry and Dry Cleaners," and the question I have to decide is this: Is this an automobile owned by or registered in the name of the named assured within the meaning of that policy.

Mr. Stanbury: Within the meaning of the policy. There is the nub of it absolutely.

The Court: It might be a little different problem to my mind if the assured had been named as Pacific Laundry and [105] Dry Cleaners, a partnership composed of R. H. McKeon and D. B. Page.

Mr. Stanbury: Your Honor, it is the same thing exactly.

The Court: Legally, yes; but it is a question of what was intended, and the construction must be against your company, must it not?

Mr. Stanbury: That is right.

The Court: Isn't that the rule?

Mr. Stanbury: That is the rule. But, your Honor says, there might be less question in your mind as to

what was intended. This page is as clear as any lawyer could write it. It is just as plain as can be written.

The Court: Now, Mr. Stanbury, they could have said: If this company hires any automobiles, uses any automobiles other than those standing in the name or owned by, we do not insure those.

Let us stop and analyze these policies here. Here is a partnership and, as you say, here is a particular activity, seeking insurance. If this truck had been owned by Page and it just happened that the motor vehicle certificate was issued in the name of this cleaning company, Mission Laundry and Dry Cleaners, there would not be any question in your mind, would there? You would not have anything to say?

Mr. Stanbury: You mean if it was in the name of our assured Pacific Laundry? [106]

The Court: Suppose that out of a matter of business pride, when they painted the name on this truck of this Mission Laundry and Dry Cleaners, Page had said, "Well, since the company is using it, we will make the company registered owner and I will be the legal owner," you would not have a word to say, would you?

Mr. Stanbury: No.

The Court: Why? The partnership bought this car and covered the motor vehicle liability of this partnership.

Mr. Stanbury: Correct.

The Court: And your company issued this policy and limited it to the business activities of this partnership.

Mr. Stanbury: That is right.

The Court: Now the question is, turning the problem around the other way, can we say that your company intended not to assume any risk of any automobile which

did not happen to be registered in the name of the partnership?

Mr. Stanbury: Oh, no, your Honor.

The Court: Well, isn't that what your argument is?

Mr. Stanbury: No, sir. I must take great pains. I had suspected that I had not made myself clear. Your Honor does not understand my point at all. I must make it clear.

We do insure McKeon and Page for every horse, automobile, bicycle and motorcycle or wagon they have, everything. We insure those men. [107]

The Court: Wait just a minute, though.

Mr. Stanbury: Yes.

The Court: They have 10 trucks and Saturday morning they get some extra calls for Monday, and they say to Gilbert, "Gilbert, you have an old station wagon, haven't you?" Gilbert says, "Yes." "Well, bring her down Monday. We have got to put that on a run Monday morning because so and so has some extra work for us."

Gilbert brings it down. It is registered in his name. Was it your intention that you not cover that in the policy?

Mr. Stanbury: Sure, we cover that, your Honor.

The Court: The automobile is not registered in the name of the named insured.

Mr. Stanbury: It does not have to be. We insure McKeon and Page. If they went out and got 500 trucks, we would find it out on our next survey and say, "Look here, your premium is going to be so much." We insure McKeon and Page in any illustration your Honor can think of. But that is not the point. The Point is: Do

we insure Gilbert? And the answer to that is unescapable if I make myself clear.

The Court: Yes. Now, Gilbert, on Saturday noon, was driving a truck owned by Page, registered with the vehicle department in the name of Mission Cleaners who are insured; to accommodate his employer he brings down his own station wagon. He is not insured? [108]

Mr. Stanbury: He is not insured, no, sir; except under his own policy. It is precisely the same situation that this country is full of and, I guess, England. I don't know anything about the continent, but policies are written that way.

The Court: Yes; I understand.

Mr. Stanbury: Without any additional assured clauses whatsoever.

The Court: And that would be a situation, a hardship, yes. But you would have to do violence to the language of the policy, so the policy could not be construed without doing violence to the language to cover that situation so as to insure Gilbert, could it? But here we have a situation where the vehicle is used by the partnership, in the business of the partnership, and is registered in the name of one of the partners who is named as one of the assured in the policy, who is a named assured in the policy, and that truck is devoted to the business. And the question is whether the limitation of the extended coverage clause would defeat coverage of Gilbert under those circumstances.

Mr. Stanbury: Well, your Honor, as your Honor well knows, with the court's background of practice, the language used in these policies is ordinarily not idle language; it usually has a meaning. Look at United Pacific's policy. An additional assured of the United Pacific is a person



driving [109] an owned automobile or a hired automobile.

The Court: Yes.

Mr. Stanbury: Expressly. The Ohio Casualty policy is not that way. It says an automobile owned or registered to assured.

The Court: And what does that mean, "registered to"? The purpose of that obviously is that if the company had bought it and had not paid for it, or had mortgaged it to someone, pledged it, and it was merely the technical owner or entitled to use it, you might say, it would still be covered if used in the business and if being used with the express permission of the assured.

Mr. Stanbury: No, your Honor. It has an obviously different meaning. Your Honor put a case where they might say, "Gilbert, bring down your station wagon." They might say that to a lot of people, maybe, to move a lot of stuff. Those people are running all over town.

As a practical matter, as we all know, the man who has an accident, if he hasn't any insurance, runs for cover and tries to get under some policy. There is a vast difference between a company insuring the master or the hirer of independent contractors, the named assured, and insuring every driver who has a truck that he is just using for the company, whether it be his own or whether it be one that the company has leased. We must find coverage within the language [110] of these policies.

The Court: Did your company, the Ohio Company, in issuing this policy, have in mind that if the employer went to the trouble of having these cars or trucks registered in the name of the employer as registered owner, and someone else was the title and legal owner, that those would be covered, whereas the employer, even though using



them and even though the vehicle is in the name of one of the partners, that the insurance would not extend to the present case?

Mr. Stanbury: I would say, without any question, they did, your Honor.

The Court: What practical purpose would the difference in the registration, as far as registration, mean to the insurance company unless it refers to a vehicle that has been purchased and has not been paid for?

Mr. Stanbury: I am not concerned with the registration clause, your Honor. "Owned." I am taking a broader one. We did not own it, by a different definition, either by 68 of the Vehicle Code or any other way. We can forget "registration."

Transferring your Honor's remarks to the broader ground, that here would we be interested in whether the assured owned the vehicle or not, let me show you what is going to happen here if your Honor interprets this clause as insuring Gilbert.

Here is what is going to happen: We have three men over [111] on this side of the table and three over here, and they are all Page; and there are two insurers and Page himself. This is no trick by an insurance company, none whatsoever. Page goes to one insurer, Ohio Casualty, and he says, "Insure me in these three capacities over here;" and he goes to the other insurer and he says, "Insure me in those three capacities over here." And they make the policy clear and there is no doubt about it. This company does not insure these three personalities over here to my right. But if the clause on "additional assured" does not mean anything, we insure the driver of every one of these three personalities here, no matter

how many he has got; if he has got 50, we insure them all.

The Court: Not unless the vehicle is being used with the express permission of the named assured. Isn't that the gist and meat of the whole provision?

Mr. Stanbury: Yes. But, your Honor, look, look what happens here if the court's tentative idea is correct. They are owned by a named assured, don't you see, they are owned by a named assured. If that is correct, we insure McKeon and Page right here. Now, if and when we say we mean "McKeon and Page," we do not mean Page doing business as Mission or this other thing.

The Court: We mean vehicles operated in the business of McKeon and Page. [112]

Mr. Stanbury: That is right.

The Court: And this vehicle—

Mr. Stanbury: No; we do not mean that, your Honor. We say we insure McKeon and Page for vehicles operated in their behalf, but we do not insure the driver unless McKeon and Page, or one or the other, owned the vehicle.

I am not making myself clear at all. We agree that there are excluded capacities, do we not? We agree that Page is not blankly insured; we have to admit that. The policy makes it too clear that there are certain activities of Page under the United Pacific policy that we do not insure. That much is certainly very definite. In this excluded capacity Page might operate one dozen vehicles, and probably did, and the company, United Pacific, insures it. That means 12 drivers. Is it reasonable to say that, although we go to the trouble to say we do not insure Page under United Pacific policy as Mission Dry Cleaners, we nevertheless insure his 12 truck drivers?

It is not conceivable, your Honor, unless the additional insured clause means what it says. Does your Honor realize that the Ohio Casualty Company insures every truck driver driving a truck owned by the United Pacific's named assured, George B. Page doing business as Mission Linen and Towel Supply?

The Court: Oh, no; that would not be so unless it were [113] being used in the business of McKeon and Page with the express permission of the management of the partnership; isn't that so?

Mr. Stanbury: No, sir. It is his ownership, not use.

The Court: Now, there is the question of construction. Is Ohio Casualty, as insurer, interested as much in ownership, or is it interested in whether or not the vehicle is being devoted to the business with the permission of the owner?

If this case here were a case where Gilbert had taken the truck on a joy ride and a dereliction of his own caused these injuries, and the trucks were in the name of the partnership, the emphasis would be on the question of actual permission, the actual use was with the permission of the named assured.

Mr. Stanbury: Why, your Honor, I do not see how we can find any such language anywhere in this contract. The language is clear, "vehicle owned or registered."

The Court: Let us read the entire paragraph to help our thinking.

Mr. Stanbury: Yes, sir.

The Court:

"With respect to automobiles owned by or registered in the name of the Named Assured the unqualified word 'Assured' wherever used in this policy

includes not only the Named Assured but also [114] any person while using the automobile \* \* \* provided"—

I am leaving out the other contention, the question of organization. That is not important here.

"—while using the automobile \* \* \* provided the actual use is with the permission of the Named Assured."

Mr. Stanbury: That, if your Honor noticed it, does not say "using an automobile" but "using the automobile."

The Court: What automobile?

Mr. Stanbury: What automobile? With respect to the automobiles owned by the named assured.

The Court: Yes. So my problem is to decide what is an automobile owned within the meaning of the policy. By whom? The named assured. Who is the named assured? It is the partners and the partnership, isn't it?

Mr. Stanbury: No, sir. I can't admit that, your Honor, because the policy there carefully and precisely distinguishes it.

The Court: And the limitation that you are speaking of is the limitation that the vehicle be in use on business of the assured or at least with the express permission, the actual permission of the partnership, and hence presumably in the business of the partnership at the time.

Let us take this sort of a situation: Here is a man, Floyd Gilbert, who works for this concern; and there are three trucks, all of them belong to Page, two of them he has [115] had put in the name of the partnership as registered owner, the third one he had just never gotten around to. devoted to the business of the partnership, is not used for anything else. Gilbert makes deliveries.

This morning he starts out in the truck registered in the name of the partnership and he has an accident, and he is covered. This afternoon he is in the other one, he has an accident and he is not covered. He is the representative of his employer at all times. Is that the intent of this policy that is called a "comprehensive policy"?

Mr. Stanbury: Yes, sir. The intent of this policy is to insure the named assureds for everything and such additional assureds as we designate. Remember, we are not withholding anything from anybody from whom we ever took one cent of premiums. They are getting full value. There is no argument with our assured, and when an interloper comes in and says, "I am a beneficiary of this particular policy from an assured," our assureds are taken care of. But when he says he gets the policy from an assured, we have a right to say, "Show me what policy and just what are you relying on." And he must go to a clause which says he must be driving a car owned by our assured, and when we look to see who are named assured is, we find a partner designated in a certain business and we find a clause that says as plainly as we can conceive, unless a man could have a crystal ball and see every refinement [116] that comes up—we can't conceive any clearer language when we say we are insuring this man Page, not as a partner in any other business or as an individual, but just as named.

The Court: You have admitted that you insured Page under the statute here.

Mr. Stanbury: That is right.

The Court: The question is: Have you insured Page's employees?

Mr. Stanbury: That is the full point, your Honor.



The Court: In other words, was it the intention of the policy to extend its coverage to Gilbert if he happens to jump up in the truck that happens to be registered in the name of the partnership, even though only bought yesterday and never yet used in the business of the partnership, but he is not covered if he lets someone else try out the new truck and he takes the old truck that has been used all along but happens not to be technically registered in the name of the partnership, but is registered in the name of one of the partners? Is that the intention of this kind of a policy?

Mr. Stanbury: Without a doubt, your Honor. The United Pacific's usage of words expressly contrary "owned or hired," there is an absolute distinction there.

The Court: But this is a printed form presumably for the same purpose. This is print. This is not any [117] insurer for anything but premium money and it presumably covers motor vehicle liabilities of a business, does it not?

Mr. Stanbury: For the proprietors; yes, sir. There is so much difference, your Honor, between things that your Honor thinks are the same that I do not know where to begin. There is such a tremendous difference.

The Court: Let me ask you this: Do you suppose that a salesman selling insurance for the Ohio Casualty Company would tell the businessman, "You had better buy the United policy because it covers more than our policy; we both call them 'comprehensive policies,' but you had better buy United"?

Mr. Stanbury: Without any doubt they would. They even went to the trouble of typing up exactly what they would not cover. Page went—and for reasons unknown to me, certainly not for that reason—I don't know why—



went to the other company and said, "You insure me over." Of course, Page does not care whether Gilbert is insured or not. Page has no interest in him.

The difference between a policy that insures the drivers and does not is tremendous, and I would like to undertake, your Honor, to briefly point out what the difference is.

How is the premium arrived at in one of these comprehensive policies? By a survey of the applicant's assured's activities.

The Court: His accident record. And is that accident [118] record affected by whether or not the truck the employee is driving happens to be registered in the name of the partnership—

Mr. Stanbury: Definitely, your Honor.

The Court: —or happens to be registered in the name of one of the partners?

Mr. Stanbury: I will guarantee—I haven't seen it—but I will guarantee the United Pacific shows this vehicle, and I will guarantee that ours does not show it.

The Court: Was the vehicle being used in the business of the partnership at the time this policy was written?

Mr. Stanbury: I do not know. It must have been at the actual business date of this policy. It very likely was, probably was, yes.

The Court: Ohio Casualty's policy is dated March 16, 1945.

Mr. Stanbury: Yes, sir. We get a non-ownership premium from McKeon and Page.

But look at the difference, your Honor. I run a law office and I have stenographers and associate counsel and partners, and we get a blanket policy. Our policy does

not cover anyone but ourselves. The men carry their own insurance. The premium is affected by that.

If we have a policy that makes additional assureds out of everybody in that office, the company has a row every time one [119] of those people has an accident.

The Court: Let us turn it around the other way. Do you suppose it was contemplated in buying this policy that that extended coverage to the persons using automobiles with the consent of the assured and was not put there to cover employees?

Mr. Stanbury: I certainly say, your Honor, that it was put there only to cover people driving cars owned by the assured.

The Court: Yes; it was put there to cover people driving cars that were covered by this policy.

Mr. Stanbury: No, sir.

The Court: In other words, the policy was written for the benefit of the partnership, with knowledge that the partners would not go out and drive the trucks; isn't that so; that they would have truck drivers?

Mr. Stanbury: Yes; that is right.

The Court: Who are these truck drivers? They are employees of the partnership; and the purpose of the policy was to extend its coverage to those people, was it not?

Mr. Stanbury: No, sir; because the language very clearly says we insure as additional assureds those driving trucks owned by the named assured, not other people.

You see what could happen. We make an agreement with United Parcel Service to deliver packages for us, and a contention could be made that, because we told the men of the [120] United Parcel Service where to go and how to go and to be polite to our customers, that they

were our employees. Then we would be insuring the drivers of the United Parcel Service.

It makes a tremendous difference, your Honor. It makes a very great difference. We had a right, of course, if Mr. Page was stupid enough to buy such a policy, to say, "We will only insure people driving Chevrolets."

The Court: No question about that. The question is what you sold. What do you sell them in the way of coverage, or what do they have in the way of coverage, and what was intended for the partnership in the way of coverage?

Was it intended that, through technicality of registration, even though registered in the name of one of the partners, should govern to determine whether or not an employee was covered?

Did you, by naming the partners, also name them as assureds and say, "Yes," as within the meaning of the policy a truck was owned by and registered — it was "owned by" at least in the name of the assured.

Mr. Stanbury: What would the situation be if McKeon and Page came to the company, owning eight trucks, and getting insurance for eight trucks and drivers, and if they were a concern which hired United Parcel Service and various people, a newspaper, for example, with all the newsboys disbursing their papers in all kinds of cars promiscuously used, doesn't [121] it make a tremendous difference to the insurer whether we insure all those drivers or not?

The Court: Surely. But this partnership is not going to have people doing things that are not in the course of business of the partnership presumably; isn't that so? If you can count on businessmen, businessmen are in business for profit. They do not engage in wild ventures that

are not in quest of profits. And this company, by a comprehensive liability policy—and I just wonder what it is—call it a contract; it is a contract but it is sold; it is sold like merchandise. We will take judicial notice of that as a matter of common knowledge.

Mr. Stanbury: Yes, sir.

The Court: Would the salesman selling this policy, would the broker selling this policy be a person who would say, "Yes; it is supposed to cover the same comprehensive matters that are covered by United Pacific Company's policy but ours is narrower. We won't cover an employee unless he is driving in an automobile that is actually registered in your name or owned by you"?

Mr. Stanbury: But, your Honor, if your Honor's reasoning is correct, then all the policies must be construed alike.

The Court: No.

Mr. Stanbury: Because, otherwise the argument could be made that our salesmen would have to admit that our policy is [122] much better than theirs but, confidentially, it is not as good as theirs on this little point, and that does not happen.

The Court: If we had a corporation here, it would be a much clearer situation. What I have to do is to try to construe the meaning of "named assured." The two partners are named 'dba Pacific Laundry and Dry Cleaners, (and Fashion Cleaners) (and Mission Laundry & Cleaners)."

Mr. Stanbury: Yes; Pacific Laundry and Dry Cleaners.

The Court: I would like to think about that some more.

Mr. Stanbury: All right, your Honor.

There is one last thing that I want to say, your Honor, and that is that our assureds who paid for this premium got everything they paid for, comprehensive liability. That is not affected in any way by the fact that we say we do not insure Gilbert, because Gilbert does not come within that definition.

The Court: Of course, what United Pacific writes in its policy does not control. I was just speculating here. It so happens they are two competitive policies apparently.

Mr. Stanbury: Well, that is right, your Honor.

The Court: I had not been accustomed to hearing one insurance company admit that another wrote a better policy.

Mr. Stanbury: But if I went through our policy with that in mind, I might find a lot of things in ours better than theirs. But I submit the word "owned" is not the same as the [123] words "owned or hired." There is a difference, and I just want to say one last thing if I may, your Honor.

The Court: You may.

Mr. Stanbury: In the National Auto case, in the first National Automobile Insurance Co. case a man ran a restaurant called the "Busy Bee Restaurant," as I recall the name; and he took a partner during the policy, and then it was Jones and Buel instead of just Jones doing business as Busy Bee Restaurant, same street, same number, same business. And there is a printed clause in the policy which says where we insure an individual it does not insure him as a partnership. The court says that what the contract says and that it is what it means, and there is no coverage. We took the trouble of typing it in there.



The Court: It is a question of interpretation on a workmen's compensation policy. It is a problem in reading the policy as a whole. It has to be construed most strongly against the insurer, doesn't it?

Mr. Stanbury: And they didn't do it. The court says, however, there is no ambiguity. That is ours. What the court said is that we concur that ambiguities are to be decided against the insurer, but the language is plain.

The Court: We read these policies in the light of the business setting in which they are handled, not in vacuum. They are not literary documents. [124]

Mr. Stanbury: No, sir; but they still must mean what they say. And if we tried to get out of one word to our assured, he would say, "Look, that is in there." And when we have got to clear exclusion—

The Court: I submit I do not hear Gilbert claiming that you haven't a clear exclusion. There is no question you are entitled to it.

Mr. Stanbury: Gilbert is that forgotten man here, but he is not complaining. He is not saying he is not doing the right thing because he is covered under another policy, anyhow.

There is one more thing and I think it is important, myself. My associate here calls my attention to it. Consider a real estate office which runs three automobiles, then he has got a lot of salesmen driving their own cars, going all around. Can your Honor not see the difference in the desires of the realtor in the covenants and premium in insuring, let us say, his payroll employees? Of course, the realtor is insured for everything; he has got comprehensive and he is never going to have a complaint. He has brought comprehensive, he has got it.



But on these additional assureds can your Honor not see the difference in the desires of the realtor in the risk run by the insurer if he insures all of these part-time salesmen who buzz like bees around some real estate offices, going out showing prospects here and there, insuring all of those people, [125] employees, as your Honor has attempted to construe this policy, driving cars on behalf of the realtor, and insuring merely the payroll employees, those driving the realtor's cars? That is this case.

The Court: Oh, yes; there is a great difference. But if Joe Doakes brings down his automobile and he uses it under an arrangement, that is quite a different problem. But here is an automobile—there are two automobiles or three, as you put it, and it is Smith and Jones, realtors, and two of them are in the name, Smith and Jones, Realtors. The third one has printed on it "Smith and Jones, Realtors," looks just like the other two; it may not be the same make automobile; it is used in the business the same as the other two and happens to be registered in the name of Smith only.

Mr. Stanbury: I don't care about that.

The Court: That presents a different problem to me.

Mr. Stanbury: I am not urging the registration cause, your Honor. That would be the most technical defense.

The Court: It happens to be owned by Smith only.

Mr. Stanbury: Well, yes. I maintain there is a considerable difference.

The Court: It happens to be owned in the sense that he has title to it.

Mr. Stanbury: Because we have got to draw the line somewhere. Every contract has got to have some begin-

ning and some [126] ending. And when we start giving it some ending by other than what is printed in it on the assumption the parties were joking when they did that, or it did not make any difference to them, then where in the world are we? We used plain language and I submit there is nothing else to turn to.

The Court: I am not going to make a new contract. I am testing my thoughts here in this discussion. I do not propose to re-write the contract or read anything out of it or anything into it. I want to find the true meaning in the light of the circumstances which control.

Mr. Stanbury: Your Honor, my last request would be, unless your Honor has recently looked at it, if your Honor will read those two Supreme Court cases of *National Auto v. Industrial Accident*, and they are very close to the construction of this specific case.

The Court: I had them up not very long ago, but it has been a few months ago. I want to read them again and any other decisions that either side has that will aid in this construction.

Will you gentlemen be able to come back two weeks from this afternoon at 1:30?

(Discussion of time for continuance omitted from transcript.)

The Court: I will continue the case for further proceedings until July 11th at 1:30 in the afternoon. If either [127] of you gentlemen find any decisions that will be helpful on this question of construction, I will be glad to have them, and, of course, a copy to the other side. Just a mere citation would be all I would want.

Mr. Stanbury: All right.

The Court: July 11th at 1:30. [128]

Los Angeles, California, Monday, July 28, 1947  
10:00 A. M.

The Court: Gentlemen, since comparison of your two sets of findings you submitted involves a proof-reading process, I thought it might be best if we discussed the findings proposed by both sides. I started out to conform the findings proposed by the plaintiff upon that basis when I discovered over toward the end that a finding was just a quotation; so I abandoned that process, and we will start now as a basis and we will use the findings proposed by Ohio Casualty Company.

Under Finding I, lines 23 and 24, the language should be modified to read "Southern District of California." Do you find that?

Mr. Stanbury: Yes; I have found it, your Honor.

The Court: Do both agree on that?

Mr. Stanbury: "Residing in the Southern District of California." What comes out, then, your Honor? Does the rest of it come out or just put in the words? Just take "United States District Court" out?

The Court: It should read: "Southern District of California," so you would strike the words "the United States District Court for the State of."

Mr. Stanbury: Oh, yes; that is right. Yes.

The Court: There is no question, I believe, in paragraph II, is there, Mr. Sackett? [130]

Mr. Sackett: No.

The Court: Paragraph III, apparently you made some objection, Mr. Sackett, or had some objection to that portion of the findings commencing upon line 16 on page 3.

Mr. Sackett: I do not believe, if your Honor please, that we made any objection to Finding III.

The Court: If there is none, we will just pass on.

Mr. Sackett: That is right.

The Court: None in Finding IV?

Mr. Sackett: None to Finding IV, your Honor.

The Court: Or V?

Mr. Sackett: None to V.

The Court: Or VI?

Mr. Sackett: There is no objection to VI.

The Court: VII?

Mr. Sackett: That, your Honor, I believe is really a matter of inquiry rather than objection, to whether or not it was your Honor's intention to make a finding that it was the intention of McKeon and Page to recognize the partnerships as separate entities. Starting on line 6, where the court stated:

"The Court finds that it was the intention of R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners, in procuring the aforesaid policy [Exhibit A of Answer of said Company, incorpor- [131] ated herein by reference] to recognize the various partnerships R. H. McKeon and G. B. Page insured by said policy, including the partnership conducted under the fictitious name of Pacific Laundry & Dry Cleaners as separate entities and to differentiate the activities of G. B. Page as a partner of R. H. McKeon in the enterprises named in said policy from the activities of said G. B. Page (also known as George B. Page) individually or in connection with any unspecified activity, all in accordance with the endorsement set forth in this paragraph."

The Court: What is your view of the meaning of that endorsement?

Mr. Sackett: Pardon?

The Court: What is your view of the meaning of that endorsement?

Mr. Sackett: General endorsement No. 3, and, as I say, it is a matter of inquiry rather than an objection, as to whether the court's decision announced on July 11th was based upon General Endorsement No. 3 as well as the language of the policies proper on the extended coverage provision. That is with respect to automobiles owned by or registered in the name of so and so. And, as I understood—I may have been misled—that the court's decision was based upon the fact that under the language of the extended coverage [132] provision, therefore, that Page was not or George B. Page was not that insured of the Ohio Casualty policy.

The Court: Yes; I announced it that way. I will put it in this manner: I was confirmed in that conclusion to some extent by the endorsement there. I had not intended to find specifically that the parties Pacific Laundry & Dry Cleaners or any other particular partnership or activity of Page. I think what saves the Ohio Casualty Company from the same liability, saves them, in my opinion, from the coverage of Floyd Gilbert, who was the driver, is the difference in the condition attached to its definition of an "additional assured." Ohio Casualty Company limited "additional assured" to automobiles owned by or registered in the name of the named assured.

Plaintiff, United Pacific Insurance Company, did not so limit the "additional assured," but provided that even with respect to a hired vehicle used with the permission of the named insured, the coverage would be extended to



that driver; and, of course, that is the precise situation here, isn't it?

Mr. Sackett: That is true, your Honor.

The Court: It was made to order, so to speak, for that differentiation. And I came to the conclusion, after considerable thought. And I must say that the typed endorsement aided me in reading the entire policy and seeing the reason for what otherwise might be purely a technical differentiation. [133]

If Ohio had not so limited the policy, or, put it this way, if Page were the "named assured," Page himself, individually, rather than Page, a co-partner doing business under the—

Mr. Sackett: Pacific Laundry and Dry Cleaners.

The Court: —Pacific Laundry and Dry Cleaners, then Ohio Casualty would have been writing a policy that would cover every vehicle registered in the name of Page, wherever it was being used, and that manifestly was not the intention of the policy. So my conclusion was that the "named assured" had to be Page in a particular capacity, that is, Page, a partner, in a particular capacity.

Mr. Sackett: And that capacity limited.

The Court: So I do not see anything in this finding that is contrary to my reasoning; and I do not see anything in the finding that would assist the Ohio Casualty particularly in view of my decision in the matter. If I am in error, I do not see anything in this finding here that would help them perpetuate the error.

Mr. Sackett: No. I will agree with your Honor on that. The main thing, as I stated, was—and the court has cleared that confusion in my mind up—that the court did base its decision on the general endorsement as well



as upon the provision, the extended coverage provision, of the Ohio policy.

The Court: You have here a situation of what is the [134] named assured here. And is that "doing business as" a description? And it might be in some cases. If we had an insurance policy in an ordinary situation, reading "payable to John Smith doing business as Mission Cleaners," I suppose, unless the question became very material as to John Smith doing business in a different capacity, you would assume that "John Smith" was the name of the assured, wouldn't you, without more?

Mr. Sackett: That is right.

The Court: But here, this typewritten endorsement fortifies the construction that the intention was not to insure Page himself, without more, but that "doing business as Pacific Laundry and Dry Cleaners" is a part of the name of the assured.

Mr. Sackett: That goes, of course, to the matter of argument.

The Court: If that typed endorsement were not there, I think I should have to reach that result in order to prevent doing violence to the language of the policy, even though it might be printed language of the policy. But the typed endorsement indicates that it was not an accidental result, but that the parties actually thought about it. That is what it adds up to in my mind.

Mr. Sackett: Of course, it was our contention with regard to this endorsement that this particular automobile [135] was not being used by Page in a type of activity encompassed by General Endorsement No. 3; in other words, it was not a different business enterprise; it is not the personal matter; it was the Pacific Laundry and Dry Cleaners who were using and had the exclusive

use of this vehicle for a long time prior to the occurrence of the accident, and it was being used by their employee through Page and McKeon doing business as Pacific Dry Cleaners.

True the vehicle was registered in the name of Page as Mission and he had leased it to himself and his partner as Pacific, but there was the activity that was insured under the Ohio policy and which the Ohio policy, we submit, had definitely intended to insure.

Now, because it had not been registered in his name as Pacific Laundry and Dry Cleaners, then their extended coverage endorsement and their other general endorsement No. 3 becomes operative and says: Well, that is a different business enterprise. It has been our contention all the way through that it was not a different business enterprise: it was the very business enterprise and activity that Ohio intended to insure.

The Court: Must we not assume that the language opposite the part of the name of the assured which says "doing business as Pacific Laundry and Dry Cleaners," means something or must be read in connection with the other name? That is the crux of the problem, isn't it? [136]

Mr. Sackett: Yes.

The Court: Who is the named assured of Ohio's policy? That is really the pin-point problem.

Mr. Sackett: That is right.

The Court: I think the answer to it is just to read the policy and find out who is the assured; and the assured is "R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners."

Now, what is the extent of the coverage or additional assured provision? So it says:

“With respect to automobiles owned by or registered in the name of the Named Assured the unqualified word ‘Assured’ wherever used in this policy includes not only the Named Assured but also any person while using the automobile \* \* \*”

It so happens that this automobile was not “owned by or registered in the name of the Named Assured.”

Now, that saves the Ohio Casualty from coverage of Gilbert, in my opinion, if the other endorsement did not exist, but if that endorsement did not exist, you might feel and I might feel: Well, that was just a lucky accident for Ohio Casualty. It just so happened the printing was just that way.

But when we look at this endorsement we see that it was an intended limitation, and so often, as we all know, by lucky printed provisions, fortunate under the circumstances, [137] an insurance company may either incur liability or escape liability.

For that reason I do not think that Finding VII adds anything. If you feel there is any serious objection to it or that it obscures the question that you might wish to raise on appeal, I would delete it.

Mr. Sackett: None whatsoever, for this reason, your Honor: That our whole theory, as the court is familiar with it, is based, regardless of whether there was the endorsement on there or the extended coverage provision, one or both,—our whole theory of the case went to both. In other words, I do not see where it affects the decision of the court at all to apply the reasoning that the court has to the endorsement.

The Court: Very well. Then we will pass VII.

Any objection to VIII and IX?

Mr. Sackett: IX, the only objection which we might have—

The Court: You add something in your Paragraph VII.

Mr. Sackett: That is the only thing. It should be added that the truck was in the exclusive possession and being exclusively used by the Ohio's assured.

The Court: Do you feel that adds anything?

Mr. Sackett: I think it goes to the background.

The Court: The evidence shows that; the stipulation shows that.

Mr. Sackett: The stipulation shows it. Of course, as [138] I understand, the findings follow both the complaint and the stipulation, based upon the court's decision.

The Court: If you wish that in there, I am perfectly willing. I take it that if you went up on appeal you would take that in there?

Mr. Sackett: I think that is right.

The Court: As I recall it, you made a stipulation with respect to the sign on the truck.

Mr. Sackett: That is correct; so we do not believe that is necessary.

The Court: Very well. X or XI?

Mr. Sackett: None to XI.

The Court: XII?

Mr. Sackett: Upon XII I would like to ask again and have counsel's views on whether the word "solely" should be used in line 28—"and each of them were solely and proximately caused by negligence."

Mr. Stanbury: The reverse of that, your Honor, is that if Echols is partly to blame, Echols has no cause of

action; and our stipulation is that Echols is entitled to recover and that his losses were caused by Gilbert.

The Court: Subject to the unquestionable possibility of contributory negligence.

Mr. Stanbury: Yes, sir.

The Court: Is there any objection to it? Up in XI, [139] gentlemen, it is correct that the truck was registered to Mission Linen and Towel Supply?

Mr. Sackett: That is correct; that was the stipulation.

Mr. Stanbury: Yes, sir.

The Court: I knew it was registered in Page's name.

Mr. Stanbury: It is registered—

The Court: Registered in the name of Page doing business as.

Mr. Sackett: That is the way I believe it is. George B. Page.

The Court: But this finding says it was owned by Page doing business as Mission Linen and Towel Supply and registered to the Mission Linen and Towel Supply Company.

Mr. Stanbury: I believe that is our exact stipulation.

Mr. Sackett: That was our stipulation, and that is correct, your Honor.

Mr. Stanbury: Just one moment. Let us make sure of it. It says in the stipulation, page 2, paragraph 2(a):

“That the accident out of which the present insurance coverage controversy arises occurred on January 16, 1946, when a truck owned by George B. Page dba Mission Linen and Towel Supply Company and registered to Mission Linen and Towel Supply Company, \* \* \*.”

The Court: Very well, that covers it. [140]

Very well, XIII. Is there anything in XIII that either of you object to?

Mr. Sackett: With regard to that, if the court please, we believe that Gilbert should be omitted from that finding, except it should not be omitted on lines 11 and 12.

“that it is true that the said Robert Echols and Beverly Echols are entitled to recover damages in excess of \$3,000.00, exclusive of interest and costs, against any or all of the defendants named in their said action against the defendants named in (1) and (2) of this paragraph solely through the imputation to them of the negligence of Floyd Gilbert by operation of law.”

I again arise to a point of inquiry. Can the court make that type of a finding, including Gilbert, in view of the fact that Gilbert has not been served in either action, neither in the State Court nor this court.

The Court: If you gentlemen stipulate that, that those are the facts in the action. That is what it amounts to; you are stipulating what the facts are.

Mr. Sackett: That Gilbert was negligent?

The Court: I considered your objection to including Floyd Gilbert, but I cannot assume that there is not a possibility that, the day before that action goes to trial, Floyd Gilbert will appear and be served and the judgment may go [141] against him. Of course, it is stipulated here that he has not yet been served with process but, non constat, he may be served prior to the trial of that action.

Reading that last portion: “that it is true that the said Robert Echols and Beverly Echols are entitled to recover damages in excess of \$3,000.00, exclusive of in-



terest and costs, against any or all of the defendants named in their said action," should not that portion of that, the words "against any or all of the defendants named in their said action," be stricken and permit it to read, as it would then, "against the defendants named in (1) and (2) of this paragraph solely through the imputation to them of the negligence of Floyd Gilbert by operation of law"?

Mr. Stanbury: I think that is correct.

Mr. Sackett: In other words, the court suggests striking out "any or all of the defendants named in their said action"?

The Court: In lines 15 and 16, page 7, strike the comma and strike the words "against any or all of the defendants named in their said action" and the comma following that. Then it would read that they are entitled to recover "against the defendants named in (1) and (2) of this paragraph solely through the imputation to them of the negligence of Floyd Gilbert by operation of law."

Does that satisfy it?

Mr. Stanbury: Yes, sir. [142]

The Court: In paragraph XIV I would strike out of lines 26 and 28 the clause: "the Court finds that the said policy of the plaintiff also provides coverage as set forth in paragraph XVIII of these findings;"

Unless there is some special reason, I do not see the necessity for the inclusion of that clause at that juncture.

Mr. Stanbury: Does your Honor at this time object to the Finding XVIII, or merely referring to it at this place?

The Court: I do not see any reason to refer to it at this place, and we will take up Finding XVIII when we come to it.

Mr. Stanbury: Just so as to guard against inconsistent findings, that was all. I might say that if these findings were inconsistent, that in XIV it is intended to be all-inclusive and XVIII does something else. It would merely be a technical irregularity, if any. But I have had the misfortune of going to Washington, D. C. to lose a judgment because of alleged inconsistent findings, and that is what makes me hyper-cautious now.

The Court: Cannot that be covered by inserting after "policy" in line 25, "among other things"?

Mr. Stanbury: Yes. Before "all injuries," if the court please?

The Court: Yes. "covers, up to the limits of said policy, among other things, all injuries." [143]

Mr. Stanbury: Yes, sir; it does. And take out the clause: "the Court finds that the said policy of the plaintiff also provides coverage as set forth in paragraph XVIII of these Findings"?

The Court: Yes. Now, as so amended is paragraph XIV satisfactory?

Mr. Stanbury: Yes, sir.

The Court: Is there any objection to XV?

Mr. Sackett: I think, your Honor, again, I had a note on that which I think has already been answered. It was a question of whether the Finding went further than the court's decision, and I believe you have resolved that discussion on the other Finding.

The Court: Should we, in line 30 on page 7, in describing the Ohio Casualty's policy, just to be consistent, say "covers, among other things, the liability"?

Mr. Stanbury: That is certainly proper if it does cover anything else. I am unaware of anything else it does cover, technically, because it does not cover Gilbert and it does not cover Page as doing business as Mission.

So I do not know what else it would refer to. I think the Ohio insures only McKeon and Page doing business as Pacific Linen and Supply Company.

Mr. Sackett: For the purposes of this controversy, I think that is correct. Of course, the policy itself does have [144] this extended coverage provision. It could be anybody, just so it was an "owned vehicle."

Mr. Stanbury: That is correct, but there is no one answering that description in the findings of the court that I know of.

The Court: Well, if you are both satisfied, we will pass on.

Is there anything in XV that anyone objects to?

Mr. Sackett: We have no objection to XV, except we believe that our Finding XIII should be added:

"That the Defendant, Floyd Gilbert, was not served with process in said San Luis Obispo County action for damages and, at the time of the trial of this cause, was not within the State of California."

The Court: Well, he might be served before the San Luis Obispo County action is tried, might he not?

Mr. Sackett: Yes.

The Court: How is it material?

Mr. Sackett: There is that possibility.

The Court: How is it material? I am not going to attempt to assume in this action that there has been a judgment against Floyd Gilbert, because there has not been according to the facts brought here, and apparently there is little likelihood that there will be in that San Luis Obispo action. There may be later in some other action. Does that [145] meet your objection?

Mr. Sackett: I believe it does, your Honor.

The Court: In Paragraph XVI I would strike the line 13 after "George B. Page individually" strike the "and/"—"individually or doing business".

Mr. Stanbury: Yes, sir.

The Court: And in line 17, after the name of "The Ohio Casualty Insurance Company," I would put a period and strike "within the meaning of said policy and the endorsement thereto set forth in paragraphs VII and VIII of these Findings."

Mr. Stanbury: Yes, sir.

The Court: Is there any other suggestions with respect to paragraph XVI?

Mr. Sackett: We would have no further.

The Court: Paragraph XVII, I would strike at the end of the paragraph the words "the Court finds that it is admitted and stipulated by the aforesaid plaintiff that the said Floyd Gilbert was an assured under its policy at the time of said accident."

Mr. Stanbury: Yes.

The Court: The record shows that.

Mr. Stanbury: That is right.

The Court: I do not believe it has a proper place here.

Mr. Stanbury: I agree with you.

The Court: Is there any other suggestion with respect [146] to Finding XVII?

Mr. Sackett: None, your Honor.

The Court: Or XVIII?

Mr. Sackett: None, your Honor, as to that.

The Court: XIX, I would strike those two "and/" before the "or".

Mr. Stanbury: Just "or"?

The Court: Just "or". Doesn't that serve the purpose?

Mr. Stanbury: Yes, sir; completely.

The Court: Is there any objection to Finding XIX?

Mr. Sackett: No objection.

The Court: Finding XX, I would strike line 30 after the name of the Ohio Company, the words: "and within the exclusion of the endorsement thereto contained in paragraph VII of these findings;"

Mr. Stanbury: Yes, sir.

The Court: And at the end of the paragraph, the words "and were activities within the meaning of the excluding endorsement set forth in paragraph VII of these Findings."

Mr. Stanbury: Yes, sir.

The Court: Is there any objection to XX?

Mr. Sackett: No. That has been covered by the court.

The Court: Paragraph XXI. I have put a period after "Exchange" at the end of line 23, and strike the words: "and that said endorsements do not affect the rights or liabilities [147] of any of the parties with respect to the accident in question."

Not that that would be improper, but it seems to me that is a conclusion of law and is not proper there.

Paragraph XXII, any suggestions with respect to it?

Mr. Sackett: No, your Honor.

The Court: Now, in the Conclusion of Law, paragraph I, line 9 refers to the San Luis Obispo County "action entitled". It seems to me that should be quoted.

Mr. Stanbury: Oh, yes.

The Court: The title.

Mr. Sackett: Quote starting with the name "Robert"?

The Court: With "Robert" and ending up with "Gilbert," apparently.

Mr. Stanbury: It is quoted. Shall I just put quotes around it? You want to put quotes around it?

The Court: Yes; I would put quotes around it.

Mr. Stanbury: Yes. Close the quote after "Gilbert,"?

The Court: After "Gilbert,".

With respect to paragraph II, should not the words in lines 24 and 25: "and subject to the provisions of paragraph III of these conclusions of law," be stricken?

Mr. Stanbury: Not unless we can agree that there will thereby be no conflict, your Honor, because there is joint insurance on Ohio's assured McKeon and Page, and the paragraph merely stating that Ohio owes that obligation may be found in- [148] consistent with the finding of joint liability; and that is the only reason that is in there, and I think it is important in this place.

The Court: Do you agree, Mr. Sackett?

Mr. Sackett: Yes; I do, your Honor.

The Court: Very well, it will stay.

Then Conclusion of Law III, page 12, at the end of it, should not this language of the conclusion commencing after the word "Company" in line 14 on page 12: "provided however that the combined payment by both plaintiff and defendant The Ohio Casualty Insurance Company shall not exceed the limits of said defendant's policy for \$25,000.00 for death of or injury to one person and \$50,000.00 for the entire accident."

Mr. Stanbury: What was the change there, your Honor?

The Court: I would strike that.

Mr. Stanbury: Oh, strike it?

The Court: Strike it entirely.

Mr. Stanbury: The only purpose for that—and the court has not expressed any opinion on it, so I don't know whether the court agrees or not—the Ohio policy says that it takes credit for any other insurance the assured has and it is not to provide anything but excess. We



know that when both policies say they are excess, that both policies have a claim to it. It does not follow necessarily that the [149] larger policy can say that we are not going to contribute to any insurance at all or give the assured more insurance than he would have under our policy.

The Court: Don't you have here both policies containing the same clause?

Mr. Stanbury: If they do have it. You say yours has it?

Mr. Sackett: Yes.

Mr. Stanbury: Theirs being the smallest one. Now, United policy says it is all excess; so does ours. I am not talking about that clause. And I do not think the United policy has this other clause where the Ohio policy says it will not pay. We should have the exact words here and it is in one of my memoranda. I think it is in the supplemental. It is in paragraph 4 under exclusions of the Ohio policy. It is Exhibit B, page 3; it reads as follows:—

The Court: "Other Insurance"?

Mr. Stanbury: Yes, sir; beginning with "provided,". It is an academic question, because this case up there in San Luis Obispo is not going to run into that sort of money; so I won't urge it strongly here at all.

The Court: I notice in United under "other insurance" it is almost verbatim.

Mr. Stanbury: Yes, sir.

The Court: I would assume that they would cancel each [150] other out.

Mr. Stanbury: They certainly cancel each other out as to the smaller limits; there is no doubt about that. But there is no reason why those upper limits could not apply, and it would be worth a vigorous argument if there were any chance of that happening. But it is not going

to happen, so I am not concerned to argue it for that reason.

The Court: Let us strike it, then.

Mr. Stanbury: All right.

Mr. Sackett: Striking out line 14?

The Court: Yes; beginning with "provided" to the end of line 18. Is there any objection to Conclusion of Law IV?

Mr. Sackett: No. No, your Honor.

The Court: With respect to Conclusions of Law V, VI, VII, and VIII why shouldn't they be stricken?

Mr. Stanbury: Well, No. V appears to be repetition of I.

The Court: Yes.

Mr. Stanbury: It is Gilbert. Let's see. There is no reference to Gilbert, your Honor, in Conclusion I. The only place where there is any reference to an obligation of Gilbert is in line 8 of page 11.

The Court: In I.

Mr. Stanbury: But only referred to as a party. [151]

Mr. Sackett: He is obligated under the contract naming both Page and Gilbert.

The Court: Just prior to "entitled", three words prior to "entitled".

Mr. Stanbury: Yes. And "to respond", down at the bottom, "to respond to and satisfy any judgment which might be rendered \* \* \*". It is covered.

The Court: So V can go out.

Mr. Stanbury: V is repetitious.

The Court: Very well, let us strike it.

Mr. Sackett: Strike V out.

The Court: V will be stricken. VI is not necessary, is it?

Mr. Stanbury: Well, only if they should dismiss up there and file a new action and contend that the court has only adjudicated this one action.

As I see it, it does not harm anybody, your Honor, and it would avoid—

The Court: I take it it would meet the situation if you used Conclusion of Law VI and struck “or any other person, firm or corporation”, because it would not be a binding adjudication upon them, anyhow?

Mr. Stanbury: No.

The Court: Do you agree to strike “or any other person, firm or corporation”? [152]

Mr. Stanbury: Yes, sir.

The Court: Then that will be stricken, and otherwise Conclusion VI will stand.

Mr. Stanbury: Yes, sir. The reason, your Honor, that Finding VII is suggested here—

The Court: That is Conclusion of Law VII?

Mr. Stanbury: Conclusion of Law VII, is because the parties came before this court to have their rights adjudicated, and the court will recall that when it came time to consider their relations to Gilbert we stipulated. It was an afternoon recess. We came back in and Mr. Brown said that we would stipulate to the court making a disposition as to the rights and liabilities of Gilbert.

The Court: Yes, Mr. Stanbury. I have done that, but when I find that Gilbert is an additional assured of the plaintiff's policy and is not an additional assured of Ohio's policy, any number of legal consequences may flow from that finding. It seems to me that that is as far as I can go in this action.

Mr. Stanbury: Perhaps so, your Honor.

The Court: Even if you stipulated that I might make a declaration to the effect of the plaintiff's obligations

upon further contingencies, those contingencies have not come to pass, and if there is any controversy from that, it has not been litigated here and I doubt if it is a matter [153] which can be adjudicated now.

Mr. Stanbury: I think that on VII the only reason for VII was to remove argument in the future about what these conclusions mean. It is true that it follows clearly as an operation of law from the previous conclusions what the rights of the parties are; but it was designed to avoid argument.

Now, the real argument, as I see it, is on Conclusion VIII, and that is the one where I acknowledge argument, that is, that there is where the argument existed as far as I can see in this whole proceeding. And the reason for suggesting that eighth conclusion, your Honor, was simply this—and it is a very important consideration—the Ohio Casualty Company and the United Pacific are before this court for a declaration of their rights, and they stipulate—

The Court: With respect to that San Luis Obispo action.

Mr. Stanbury: We did not ask for it. The plaintiff asked for it, an adjudication of their rights, and certainly that is broad enough to cover this situation.

To hold the matter of the pleading in abeyance for a moment, your Honor, the parties here stipulated that Gilbert caused this accident, he is liable. We stipulated that the court may decide where the insurance lies and the court has [154] made a finding. There is nothing else to be done between these two companies. We can go to Nebraska and sue Gilbert but, with what object?

Gilbert, if we try to collect from Gilbert, that is very true we have to get a judgment against Gilbert, but in

attempting to collect from the United Pacific with what object do we go. It would only be for the benefit of United Pacific, to prove what they admit right here in writing in this court.

The Court: Let us dispose of VII first.

Mr. Stanbury: Yes, sir.

The Court: Are you ready to strike VII?

Mr. Stanbury: Well, your Honor, I would stipulate to strike VII if VIII is left in, but if VIII goes out, then I want to be heard some more on VII.

The Court: They duplicate each other, do they not?

Mr. Stanbury: They do; yes.

The Court: Well, let us dispose of VII by striking it out, because VIII is larger than VII.

Mr. Stanbury: That is all right; yes.

The Court: Let us discuss VIII. I am just wondering whether that is a justiciable controversy at this time, what the rights of the plaintiff and Ohio Casualty might be in the event at some future time there should be a judgment against Floyd Gilbert. [155]

Mr. Stanbury: Now, let us cover what will happen if we get a judgment against Gilbert. My point is that where everything is stipulated to as between the parties who stipulate, it is an idle thing to go to Nebraska and prove what is admitted, for the benefit of the United Pacific.

Between the United Pacific and the Ohio we are in court asking the court to decide our rights, and the Ohio is about to advance some money to contribute to a settlement or help to satisfy a judgment with the United, which, by operation of law, the United is liable for if the liability of Gilbert is reduced to judgment.

The Court: But McKeon and Page doing business as Pacific Laundry and Dry Cleaners are not here.

Mr. Stanbury: This conclusion might have to be whittled down to take them out, your Honor. Let us assume that it is rewritten to take them out and that the court goes no further than the parties that appeared in their complaint and stipulated in court here that this court decide their rights, United and Ohio, what right is United being deprived of here?

They are deprived of the right of having a judgment obtained against their assured Gilbert, which is an idle act and an utter waste of time and money, because they stipulate to the liability of their assured right here. So how is anything added by a judgment in Nebraska or anywhere else? [156]

I cited to your Honor a case, a Washington case, holding that it is not necessary to get a judgment against the assured in order to be entitled to recover under a policy if it is clearly established that the liability exists.

The Court: Yes; I recall the case.

Mr. Stanbury: This court could not adjudicate anything as to Gilbert nor as to McKeon and Page.

The Court: All right; let us take them out of there.

Mr. Stanbury: Yes.

The Court: Conclusion of Law VIII will read then, will it not, "That the plaintiff United Pacific Insurance Company alone insures the liability of Floyd Gilbert in connection with the said accident of January 16, 1946, and is obligated, within the cash limits of its policy,"—we do not need the "cash," do we?

Mr. Stanbury: No.

The Court: —"within the limits of its policy," strike "cash"—"to respond to and satisfy any judgment which may be rendered against Floyd Gilbert in connection with the said accident"—we strike the next clause, strike the next clause "and to pay, indemnify and reimburse any



claim which may be made against the said plaintiff United Pacific Insurance Company, as insurer of Floyd Gilbert, by R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners or R. H. McKeon or G. B. Page [157] individually."

Where does that leave us?

Mr. Stanbury: If your Honor please, I would suggest not striking it but changing it to read as follows, going back to where your Honor suggested to strike, "and to pay".

The Court: Yes.

Mr. Stanbury: And permit it to read this way: "to pay, indemnify and reimburse any claim which may be made against the said plaintiff United Pacific Insurance Company, as insurer of Floyd Gilbert by"—dropping down—"defendant The Ohio Casualty Insurance Company for reimbursement of expenditures actually made or to be made \* \* \* in satisfaction of judgment or in settlement of claims arising from said accident and specifically with regard to the claims of Robert Echols and Beverly Echols."

That disposes of the Echols' rights, except those parties that come in here and ask the court that the court declare their rights.

At a time when the decision of this court was not known to these people, both counsel said, "We stipulate that the court may decide this question of Gilbert and thus avoid the circuitry of action which is perfectly ridiculous." The United Pacific, stipulating its assured's liability, is in no position to say, "You go to Nebraska and get a judgment and prove it," because they admit it right out here [158] in open court; they admit it in writing. And even in the old days, I believe that their admission would dispense with the condition precedent of a judg-

ment; but certainly in the spirit of the present times, where we look more to the substance than we used to, I respectfully submit, your Honor, that for the United Pacific to say that although we admit in these proceedings that our assured is liable, and although we have submitted it to a court to decide who insured this man, nevertheless, we have a right to make you go and find him and procure a judgment and thus prove to us your claim.

The Court: How can they bind him? That is what is bothering me.

Mr. Stanbury: They can't, your Honor.

The Court: If they paid out for his account, they might have a claim against him for reimbursement.

Mr. Stanbury: Not as his insurer. An insurer can't get the money back from the insured.

The Court: No. Your answer to that is, of course, that there is no action over.

Mr. Stanbury: No, sir.

The Court: Against the principal, or, rather, against the assured here, Gilbert.

Mr. Stanbury: Yes, sir. In fact, I will tell you what I think of this point, your Honor. I would be willing [159] to have Mr. Sackett argue it for me. If Mr. Sackett can tell your Honor in what respect United Pacific gains anything or what right they have to say: "Although we admit our assured's liability, you must get a judgment against him to prove it to us," if he can advance any reason that sounds compelling, I think it is more convincing than hearing me argue the contrary. I don't think it can be done.

The Court: What do you say, Mr. Sackett?

Mr. Sackett: Well, we feel in regard to both VII and VIII—of course, VII is out—but VIII goes to the subrogation theory of the defendant Ohio Casualty, and this

attempts to make a finding by this court as to what the rights might be in the future, what might be done in the future.

I will admit that we have stipulated that the negligence of Gilbert is what brought this about. There has been a finding that Gilbert is the sole assured of the United Pacific and not of the Ohio.

The Court: Can there be any question but what the legal consequences, as Mr. Stanbury claims, will follow if the court's construction here is correct?

Mr. Sackett: I do not say that there is. In fact, the court finds that the Ohio does not insure Gilbert; that the United does insure Gilbert. All right. The legal effect of that is what? They can proceed to subrogate against [160] their employee Gilbert.

The Court: Is there any reason why this court cannot adjudicate that result, the plaintiff here having sought the equitable remedy and a court of equity being always inclined, once it takes jurisdiction, to resolve the entire controversy?

Mr. Sackett: We feel, while the objection was raised to that, or, rather, not an objection—it was left out of the findings we proposed because the court had not pronounced that as its decision on July 11th. This verifies it, and if the court does make that as a part of the decision, I personally can see no objection to that being done.

The Court: Of course, what I announced on July 11th was legally what the court intends to do.

Mr. Sackett: I appreciate that, your Honor.

The Court: The formalities have to be taken care of. I always find that a great many things, as a rule, we think of when we come to settling the final judgment that may

not have been anticipated as a matter of detail at the time of the decision.

Mr. Sackett: To be honest and frank with the court—

The Court: I have been inclined to agree, but I am impressed with this fact: The plaintiff here sought the remedy, invoked the equitable jurisdiction of this court, with the consequences that I have just adverted to; and the [161] fact that the plaintiff has stipulated that the negligence of its assured was the sole proximate cause of this accident. There is no question, as has been pointed out here, of any possible claim over for reimbursement against the assured; so there is no reason why the plaintiff could not stipulate facts comprising the condition precedent to liability under its policy, and having done so, should not this court of equity clean up the controversy, button it up, in the language of the street?

Mr. Sackett: I can advance no argument, your Honor, against what the court has stated. And, as I wanted to state to the court, these matters were sent immediately up to Mr. Brown who has carried the laboring oar in this case—I have been more or less the Los Angeles go-between, you might say—and he did not think that was necessary, and we could work it out as we have.

The Court: If I am in error and you take an appeal, why, perhaps the entire matter can be corrected. But I believe that the Federal Court, having the very broad equitable jurisdiction—as broad as the courts of chancery had at the time of the Revolution—that we are a little bit too niggardly sometimes in the exercise of it and leave controversies hanging that should not have been left hanging.

I am glad to have this argument impressed upon me for that reason. I think that it should be adopted, and then the [162] matter is closed one way or the other when it

becomes final. So let us amend Conclusion of Law No. VIII to read as follows:

“That the plaintiff United Pacific Insurance Company insures the liability of Floyd Gilbert in connection with the said accident of January 16, 1946, and is obligated, within the limits of its policy, to respond to and satisfy any judgment which may be rendered against Floyd Gilbert in connection with the said accident and to pay and reimburse any claim which may be made against the said plaintiff United Pacific Insurance Company, as insurer of Floyd Gilbert, by defendant The Ohio Casualty Insurance Company for reimbursement of expenditures”—

instead of

“actually made”—

“reasonably and necessarily made or to be made by The Ohio Casualty Insurance Company in satisfaction of any judgment.”

Well, I am somewhat in doubt about that language there at the present time.

Mr. Stanbury: I think that we should limit it to Robert Echols and Beverly Echols.

The Court: Yes; any final judgment which might be rendered in favor of Robert Echols and Beverly Echols or [163] either of them for damages proximately resulting from the aforementioned accident of January 16, 1946. Will that cover it?

Mr. Stanbury: I am writing. I have something to say, your Honor. If another judgment is rendered up there, if we settle it, as we will, and the action is going to be settled—in fact, the price is agreed on—there is no objection to telling the court it is settled?

Mr. Sackett: No.



Mr. Stanbury: That case is settled for \$10,250. It has not gone through yet. Under the court's order we shall pay out \$5,125 as one of the insurers of this employer.

The Court: You can cover that by stipulating the judgment.

Mr. Stanbury: We were trying to avoid that by not having to go up to San Luis Obispo and doing that. That is what we were going to do, and we decided not to do it. Now, if this finding is put in it, the United Pacific would be very foolish if they did not say, "Well, we won't do it by stipulated judgment, because by that way we avoid the spirit of the court's fourth and fifth conclusions." I won't say they will do it.

The Court: How could I do any more? I could not conclude that United Pacific would be responsible for more if the Ohio just wanted to generously go out and settle. [164]

Mr. Stanbury: Except "reasonable and necessary." It puts us on proof. If we sue the United Pacific, we have to show it was reasonable and necessary. The reason I put in "actually made" before was that I thought it covered the same thing.

The Court: I think it can be worded much better than we are wording it now.

Mr. Stanbury: Yes, sir.

The Court: If you will rephrase that so that it is clearly qualified and it is all expenditures made in the way of settlement of the claim, those which are reasonably and necessarily made, the same as you would have in a reinsurance agreement application.

Mr. Stanbury: If the court is satisfied with the words "reasonably and necessarily"—



The Court: "made or to be made by The Ohio Company."

Mr. Stanbury: Yes, sir; "in satisfaction"—

The Court: Let us put it "in settlement".

Mr. Stanbury: May I make this suggestion, your Honor: That we go exactly as the court has dictated it down to that point, which will read: "by defendant The Ohio Casualty Insurance Company for reimbursement of expenditures reasonably and necessarily made or to be made by the Ohio Casualty Insurance Company in satisfaction of any final judgment which may be rendered in favor of Robert Echols [165] and Beverly Echols or either of them for damages proximately resulting from the aforementioned accident of January 16, 1946, or in reimbursement or in settlement of the claims of the said Robert Echols and Beverly Echols reasonably and necessarily made by the said Ohio Casualty Insurance Company."

The Court: How is it going to read now?

Mr. Stanbury: "or in settlement of any claims of said Robert Echols or Beverly Echols."

The Court: Wouldn't you think it better, if you are going to repeat it, to put a comma and "for reimbursement of expenditures reasonably and necessarily made or to be made by The Ohio Casualty Insurance Company either (1) in satisfaction of judgment, or (2) in compromise settlement of the claims of Robert Echols and Beverly Echols or either of them arising from said accident"?

Mr. Stanbury: Yes, your Honor.

The Court: You can no doubt improve upon that.

Mr. Stanbury: Anyway, I have the exact idea. I was using editorial license here for that same thought.

The Court: There is always editorial license to improve it.

Mr. Stanbury: Yes, sir.

The Court: I think the paragraph V of the judgment proposed by the United here and directing action in accordance with the declarations here would be in order, would be an [166] appropriate last paragraph to the judgment.

Mr. Sackett: I thought I had a copy of the judgment.

Mr. Stanbury: That is all right. It is in your conclusion, isn't it?

Mr. Sackett: No; not the direction.

The Court: Do you have a copy?

Mr. Sackett: I do not have one with me.

The Court: Here is a copy. The clerk will hand you one. That will require some editorial revamping, but it seems to me it would be in order as a last paragraph of the judgment for the court to direct the parties to act in accordance with the declarations which they sought.

Mr. Stanbury: Yes, sir.

The Court: Will you revise these findings and judgment?

Mr. Stanbury: Yes, sir.

The Court: And submit them? Can you have them here by day after tomorrow?

Mr. Stanbury: I can do it and will do it; yes, sir.

The Court: Will you submit them to Mr. Sackett?

Mr. Stanbury: Yes; I will.

The Court: And will you endorse your approval or notify the clerk promptly if you have any objections, Mr. Sackett?

Mr. Sackett: I certainly will, your Honor.

The Court: Does that cover it, gentlemen?

Mr. Stanbury: Yes, your Honor.

Los Angeles, California, Friday, July 11, 1947.

1:30 P. M.

The Court: I recall very distinctly where the argument left off, gentlemen. Is Mr. Brown not here?

Mr. Sackett: Mr. Brown is not here. He is in Portland.

The Court: I am sorry Mr. Brown is not here, because I wanted to discuss with him certain phases of this matter, but they have already been discussed.

Mr. Sackett: If counsel is agreeable that this matter be continued for a short time for further hearing, I will have Mr. Brown down here.

The Court: It will not be necessary. I am clear on the matter in my own mind. The arguments have all been very helpful to me.

It seems to me that, despite all the reasons advanced by court and counsel at the last hearing as to why Gilbert should be insured within the meaning of the policy, that result has not been reached without doing violence to the language of the policy. There were times during the argument when I thought it could be. I am clear now in my own mind, that to treat Gilbert as insured under The Ohio Casualty policy would require treating everyone who drove an automobile or vehicle registered in the name of Page, with Page's consent, as an additional insurance policy, and the result would be that Page might be doing business under several different names, as, for example, [2] in the cleaning and dyeing business, the Mission Linen and Towel Supply Company, and Pacific Laundry and Dry Cleaners. He was doing business under several different firm names.

The Ohio Casualty policy expressly states with respect to automobiles owned and registered in the name of the

named insured. In my opinion the name Pacific Laundry and Dry Cleaners must be read as a part of the named insured. To say otherwise you would reach the result that as to any vehicle owned by Page, registered in the name of Page, and being used with his consent, the person driving the vehicle would be the named insured, within the meaning of The Ohio Casualty policy.

I am convinced now, as Mr. Stanbury so vigorously urged at the last argument, that The Ohio Casualty policy is not as broad as the United Pacific policy.

I therefore find, with respect to the accident referred to in the complaint, as the accident of January 16, 1946, that both policies apply to and cover that accident; that is, the policy of The Ohio Casualty Insurance Company and the policy of the United Pacific Insurance Company.

I further find that both insurers are bound and obligated to provide a defense to action numbered 15733 now pending in the Superior Court of the State of California in and for the County of San Luis Obispo, as described in the complaint, and that both insurers, United Pacific Insurance Company and The Ohio Casualty Insurance Company, are bound to respond, under [3] their policies, for such judgment as may be rendered in that action against R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, and George B. Page, doing business individually under the fictitious name of Mission Linen and Towel Supply Company.

I further find that the plaintiff, United Pacific Insurance Company, a corporation, does insure the driver of the vehicle, Floyd Gilbert, and that Floyd Gilbert is assured within the meaning of the United Pacific policy, but that Floyd Gilbert is not covered, and is not an assured within

the meaning of the policy of The Ohio Casualty Insurance Company.

Does that cover the matter, gentlemen?

Mr. Stanbury: There is one issue, your Honor, that is not covered; that is, as to the San Luis Obispo situation, your Honor has made no announcement of the finding as to prorating of that liability.

The Court: They are both insured. They are equally liable to provide a defense in that action, and to respond, as stated within the limits of their policy for the judgment which may be rendered in that action.

Counsel for the plaintiff will prepare findings of fact and conclusions of law and judgment embodying the ruling. How soon can those be prepared, Mr. Sackett?

Mr. Sackett: What would be the length of time the court would require? I am pretty much tied up. [4]

The Court: Mr. Stanbury, can you prepare them right away?

Mr. Stanbury: I am also tied up, but I can do it. I believe I can dictate them tomorrow morning.

The Court: We will say within five days?

Mr. Stanbury: Yes.

The Court: Very well. Counsel for The Ohio Casualty Company will prepare findings of fact and conclusions of law and judgment, and settle them under Rule VII, within five days.

[Endorsed]: Filed Nov. 6, 1947. Edmund L. Smith, Clerk. [5]

[Endorsed]: No. 11799. United States Circuit Court of Appeals for the Ninth Circuit. United Pacific Insurance Company, a corporation, Appellant, vs. The Ohio Casualty Insurance Company, a corporation, R. H. McKeon, individually, George B. Page, individually, R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners; George B. Page, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company; Floyd Gilbert, Robert Echols and Beverly Echols, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed November 28, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit



In the United States Circuit Court of Appeals  
Ninth Circuit

Case No. 11799

UNITED PACIFIC INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

THE OHIO CASUALTY INSURANCE COMPANY,  
a corporation, et al.,

Defendants.

ADOPTION OF STATEMENT OF POINTS UPON  
WHICH APPELLANT WILL RELY ON AP-  
PEAL

Comes now the Appellant in the above entitled cause and hereby adopts for its points upon which it will rely on appeal, the Statement of Points appearing in the transcript of the record.

HARRY E. SACKETT

RAYMOND G. BROWN

Attorneys for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 5, 1948. Paul P. O'Brien,  
Clerk.



No. 11799.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

---

UNITED PACIFIC INSURANCE COMPANY, a corporation,  
*Plaintiff,*

*vs.*

THE OHIO CASUALTY INSURANCE COMPANY, a corporation, R. H. McKEON, individually, GEORGE B. PAGE, individually, R. H. McKEON and G. B. PAGE, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, GEORGE B. PAGE, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company, FLOYD GILBERT, ROBERT ECHOLS and BEVERLY ECHOLS,  
*Appellees.*

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BRIEF OF APPELLANT.

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FILED  
APR 17 1948

PAUL P. HARRIS  
CLERK

HARRY E. SACKETT,

RAYMOND G. BROWN,

810 South Spring Street, Los Angeles 14.

*Attorneys for Plaintiff.*



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No. 11799.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

UNITED PACIFIC INSURANCE COMPANY, a corporation,  
*Plaintiff,*

*vs.*

THE OHIO CASUALTY INSURANCE COMPANY, a corporation,  
R. H. McKEON, individually, GEORGE B. PAGE,  
individually, R. H. McKEON and G. B. PAGE, doing  
business under the fictitious name of Pacific Laundry  
and Dry Cleaners, GEORGE B. PAGE, individually and  
doing business under the fictitious name of Mission  
Linen and Towel Supply Company, FLOYD GILBERT,  
ROBERT ECHOLS and BEVERLY ECHOLS,  
*Appellees.*

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## BRIEF OF APPELLANT.

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### I.

## STATEMENT OF THE CASE.

### 1. The Parties.

This action was brought by United Pacific Insurance Company, a corporation, against The Ohio Casualty Insurance Company, a corporation; R. H. McKeon, individually; George B. Page, individually; R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners; George B. Page,

individually and doing business under the fictitious name of Mission Linen and Towel Supply Company; Floyd Gilbert; Robert Echols, and Beverly Echols. The parties stand in the same relative positions in this Court that they did in the Court below. Appellant will be referred to as "United" and The Ohio Casualty Insurance Company, appellee, will be referred to as "Ohio." The defendants in the District Court, R. H. McKeon, individually, will be referred to as McKeon; George B. Page, in his individual capacity, will be referred to as Page; R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, will be referred to as McKeon and Page dba Pacific Laundry; George B. Page, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company, will be referred to as Page dba Mission Linen; Floyd Gilbert will be referred to as Gilbert; Robert Echols and Beverly Echols will be referred to as claimants.

Reference will be made to the printed pages of the transcript of the record as TR.

## 2. The Jurisdictions.

The jurisdiction of the District Court was invoked under the provisions of Section 274d of the Judicial Code, as amended, 28 U. S. C. A. 400,<sup>1</sup> and under Section 24

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<sup>1</sup>"(1) In cases of actual controversy except with respect to Federal taxes the Courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declarations, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction

of the Judicial Code, 28 U. S. C. A. 41.<sup>2</sup> The amount in controversy was admittedly more than \$3,000.00. United is a citizen of the State of Washington. Ohio is a citizen of the State of Ohio. The other defendants were citizens and residents of the State of California at the time the action was filed, with the exception of Gilbert who had departed from the jurisdiction. This Court has jurisdiction. (*Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U. S. 270, 85 L. Ed. 826, 61 S. Ct. 510.)

### 3. The Pleadings.

United filed the action November 26, 1946, alleging that it brought the proceeding under Section 274d of the Judicial Code; that it was a corporation of the State of Washington engaged in the casualty insurance business and duly licensed to transact such business in the State of California; that Ohio was a similar corporation, organized under the laws of the State of Ohio and licensed to transact casualty business in the State of California; that the individual defendants were natural persons and citizens of the State of California; that the amount in controversy exceeded \$3,000.00, exclusive of interest and costs; that Page engaged in various business enterprises, sometimes as an individual and at other times as a co-

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to grant the relief. If the application be deemed sufficient, the Court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

“(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.”

<sup>2</sup>“The district courts shall have original jurisdiction \* \* \* where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, \* \* \* is between citizens of a State and foreign States, citizens, or subjects.”

partner under various fictitious names; that one of these enterprises in which Page engaged was known as Mission Linen and Towel Supply Company; that McKeon and Page engaged in a separate business enterprise as co-partners under the fictitious name of Pacific Laundry and Dry Cleaners.

That on September 18, 1945, United issued a policy of automobile liability insurance to Page individually and dba Mission Linen, as well as under other fictitious names not pertinent to the issues here; that the policy provided indemnity in favor of Page because of injuries to members of the public, with a limit of \$10,000.00 as applicable to one person and subject to that limit for each person, the sum of \$25,000.00 for each accident giving rise to claims or suits against him, and \$5,000.00 for damage to property of others; that the policy contained a provision relative to other insurance which, in substance provided that insurance under the policy should not be construed to be concurrent or contributing with any other available insurance.

That on January 16, 1946, Gilbert was driving a truck registered in the name of Page dba Mission but on the business of McKeon and Page dba Pacific Laundry, at which time claimants were injured; that Ohio had issued a policy to McKeon and Page dba Pacific Laundry and that the policy of Ohio applied to the accident, but that Ohio refused to accept responsibility; that claimants had brought action in the Superior Court of the State of California in and for San Luis Obispo County; that the defendants in the action for damages in the state court were McKeon and Page dba Pacific Laundry, Page dba Mission, and Gilbert, driver of the accident vehicle.

That an actual controversy existed in that United maintained that Ohio had the responsibility of providing a de-



fense to the action for damages in the state court and paying any judgment rendered therein, up to the limits of its policy, which were \$25,000.00 for one person; \$50,000.00 for each accident resulting in injury to more than one person, and \$5,000.00 for damage to property of others; that Ohio declined to accept responsibility, claiming that it did not have the responsibility, but that United covered the accident and was liable under its policy. United prayed for a speedy hearing of the cause; that the Court declared it had no responsibility in connection with the accident, but that the liability rested upon Ohio, and for such other and further relief as to the Court should seem just, meet and proper [TR. 2 to 10]; that the personal liability of Gilbert was covered by Ohio's policy.

Ohio filed an answer in which it set up the issuance of its policy of insurance in substantially the terms alleged in United's complaint, but it alleged further the provisions of a general endorsement to the effect that Ohio's liability did not attach to the liability of Page "a partner, for his personal non-business exposures or activities, or his liability in connection with other business activities as an individual, a director, or an executive officer of a corporation." [TR. 15, 17.]

Ohio further averred that the liability of United was primary and that its liability, if any, was secondary. Ohio joined in the prayer for a declaration of rights and prayed for general relief. [TR. 17, 18, and 19.] United attached to its complaint a copy of its policy of insurance. [TR. 11.] Ohio attached to its answer a copy of its policy of insurance. [TR. 20.]

Claimants Robert Echols and Beverly Echols, filed an answer pleading substantially that they were entitled to compensation from one if not both United and Ohio, and

praying for general relief. Neither Page individually nor dba Mission, nor McKeon and Page dba Pacific Laundry answered or otherwise pleaded.

#### 4. The Facts and Issues.

On April 26, 1947, the District Court entered an order for pre-trial hearing requiring the parties to agree insofar as possible on the facts and issues and to state their separate contentions on the issues upon which they could not agree. [TR. 30.]

United and Ohio entered into a stipulation of facts and issues. [TR. 34.] Claimants joined. Diversity of citizenship and that the amount in controversy in excess of \$3,000.00 was stipulated. It was agreed that the controversy arose out of an accident of January 16, 1946; that the accident vehicle was driven by Gilbert. That at the time of the accident the insured truck was registered to Page dba Mission Linen, but that it was leased to McKeon and Page dba Pacific Laundry; that it was actually operated at the time of the accident by an employe of McKeon and Page dba Pacific Laundry, and on the business of McKeon and Page dba Pacific Laundry. [TR. 34.] The occurrence of the accident and the filing of the suit by claimants in the Superior Court of California at San Luis Obispo was stipulated. The extended coverage clauses of both policies were set forth. [TR. 37-38.] While both policies were issued on what is known in the insurance business as a comprehensive liability form, they differ insofar as extended coverage—insurance to persons other than owners or named insureds—is concerned. United's policy admittedly covered the personal liability of Gilbert, subject to the limitations otherwise contained in the contract. Ohio's policy covered "with respect to automobiles owned by or registered in the name of the Named

Assured \* \* \* any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured." [TR. 37.]

The parties were unable to agree entirely and stated their separate contentions. [TR. 40.] United contended that California law applied to both policies; that the accident vehicle was "owned by or registered in the name of the Named Assured" of Ohio's policy; that since the accident vehicle was being used in the furtherance of the business of Ohio's assured and by its employee, the policy of Ohio applied to the exclusion of United's policy; in the alternative, that there was double insurance and that both companies were liable in proportion to the limits of liability stated in the respective policies; that there was a total of \$35,000.00 applicable to the accident, \$10,000.00 of which was provided by United and \$25,000.00 of which was the liability of Ohio; that United was liable for 2/7 of the loss and Ohio for 5/7.

Ohio also contended that the substantive law of California controlled; that its policy excluded any activities of Page and that Page dba Mission Linen was not an assured thereunder; that the accident vehicle was not one "owned by or registered in the name of the Named Assured" within the meaning of its policy; that Gilbert's personal liability was not covered by Ohio's policy; that United covered the personal liability of Gilbert and on the theory that the master could subrogate against a negligent servant and thereby reach the insurance carrier protecting the negligent servant, and United being such insurer, therefore had the primary liability and Ohio the secondary; and in the alternative, that should it be found that both policies provided concurrent insurance, the "other insurance" clauses cancelled each other and that Ohio's lia-

bility was excess after the liability of United was exhausted. [TR. 34 to 43 incl.]

The pertinent provisions of United's policy were attached to the stipulation. [TR. 44.] Likewise the applicable provisions of Ohio's policy were attached. [TR. 48.] General Endorsement No. 3, relied on by Ohio, was attached. [TR. 51.] Certificate of Insurance issued by Ohio to Camp Cooke Post Exchange, hereinafter referred to as Certificate of Insurance, relied on by United to show that Ohio covered the personal liability of Gilbert, was attached. [TR. 50, 51.]

The case was tried to the Court without a jury, beginning June 13, 1947. [TR. 81.] It was stipulated at the beginning of the trial that Ohio's assured, McKeon and Page dba Pacific Laundry, had rented and exclusively used the accident vehicle for a period of one year prior to the accident from United's insured and that Ohio's assured had paid rental on the truck throughout that period and had a sign painted on the truck as follows "Pacific Laundry." [TR. 81.]

Gilbert was never served in the state court action for damages by claimants. Settlement with claimants was made subsequent to the trial of the instant case for \$10,250.00. Ohio paid \$5125.00 and United a like amount. [TR. 208.]

Gilbert was not served in this action. The return of the Marshall shows that he had departed from the state. [TR. 84.] He was dismissed as a party. [TR. 84.]

During the trial Ohio placed great reliance upon its General Endorsement No. 3 purporting to limit its coverage to the activities of McKeon and Page dba Pacific Laundry. [TR. 50, 51.] United placed importance on Certificate of Insurance attached to Ohio's policy which contained a description of the risk assumed by Ohio as

applicable "to all automobiles owned *or operated by the insured.*" [TR. 51.] (Emphasis added.)

The milestone of the case was reached when both United and Ohio conceded in open court that their liabilities were equal in the state court action for damages by claimants. United conceded that both companies were liable and that the liability should be prorated in accordance with California law. Ohio conceded equal liability except as to Gilbert. [TR. 108.] The existence of double insurance was conceded. [TR. 109.]

The liability of United arose by reason of Section 402 of the Motor Vehicle Code of California.<sup>3</sup>

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<sup>3</sup>"LIABILITY OF PRIVATE OWNERS.

"(a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

"(b) The liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant is limited to the amount of five thousand dollars for the death of or injury to one person in any one accident and subject to said limit as to one person is limited to the amount of ten thousand dollars with respect to the death of or injury to more than one person in any one accident and is limited to the sum of one thousand dollars for damage to property of others in any one accident.

"(c) In any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this State. Upon recovery of judgment, recourse shall first be had against the property of said operator so served.

"(d) In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner is subrogated to all the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recovered against such owner."



Such liability is vicarious. The statute makes the registered owner of a motor vehicle liable but provides that the assets of the driver must first be exhausted and also that the owner is subrogated to the rights of claimant or creditor against the driver.

Ohio's liability arose by operation of law; Gilbert was the agent and servant of McKeon and Page dba Pacific Laundry when the liability to claimants was incurred.

The issues thus raised for determination are whether or not there can be contribution among joint tort-feasors for the benefit of the respective liability insurers where neither of such joint tort-feasors participate personally in the tort. The liability of Ohio's assured was derivative. The liability of United's insured was also derivative and vicarious. Under such a situation can one such tort-feasor subrogate against the other? Does the right of contribution exist between two such joint tort-feasors where the liability is derivative only? A second issue tried in the court below had to do with a determination of the extent of coverage of Ohio's policy as to Gilbert. The trial court found that Ohio's policy did not cover his personal liability; the District Court found in effect that McKeon and Page dba Pacific Laundry can subrogate against Gilbert, although he was a stranger to the record and dismissed from the case, and thus reach the proceeds of United's policy. [TR. 70.] Hence, this appeal.



II.

**SPECIFICATION OF ERRORS.**

In writing this brief and correlating the law on the various points which United wishes to bring to the attention of this Court it has been found that some of the points set forth in the statement of points to be relied upon [TR. 75] necessarily merge with each other, and for that reason the points to be relied upon in the Court of Appeals, while the same in substance, are re-arranged under the following headings:

1. THE DISTRICT COURT ERRED IN FINDING AND HOLDING THAT THE PERSONAL LIABILITY OF GILBERT WAS NOT COVERED UNDER THE OHIO POLICY, FOR THE FOLLOWING REASONS:
  - (a) Under Certificate of Insurance Ohio's policy issued subsequent to the contract itself, coverage applied to all automobiles "owned or operated" by Ohio's assured.
  - (b) Under the Statute in California any person named in a policy of automobile insurance is an owner of the motor vehicle.
  - (c) Under the aggregate theory of partnership as it obtains in California, the accident vehicle was "an automobile owned by or registered in the name of" Ohio's Named Assured.
2. THE RIGHT OF CONTRIBUTION DOES NOT EXIST IN CALIFORNIA BETWEEN JOINT TORT-FEASORS. NEITHER DOES THE RIGHT OF SUBROGATION EXIST BETWEEN LIABILITY INSURERS OF JOINT TORT-FEASORS.

3. THERE IS DOUBLE INSURANCE, ADMITTEDLY AND BY STATUTE AND THEREFORE BOTH COMPANIES ARE LIABLE IN PROPORTION TO THE LIMITS OF LIABILITY STATED IN THE RESPECTIVE POLICIES.
4. THE COURT ERRED IN FAILING TO FOLLOW THE RULE OF *ERIE RAILROAD COMPANY VS. TOMPKINS*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

### III.

#### SUMMARY OF ARGUMENT.

The District Court applied the doctrine of subrogation in favor of Ohio's assured against Gilbert in order to reach the policy of United. As stated by this Court in *American Surety Company v. Bank of California*, 9 Cir. 133, F. (2d) 160, 162, the right of subrogation is a creature of equity, applicable where one person is legally required to pay a debt for which another is primarily responsible, and which the latter should in equity discharge. There was no equity in holding United liable when the loss occurred out of the business operations conducted by Ohio's assured. The District Court overlooked the fact that both Ohio's assured and United's insured were joint-tort-feasors and that the doctrine of subrogation cannot be applied in favor of a liability insurer of one of the joint tort-feasors. The District Court failed to follow in this respect the decision of the Supreme Court of California in *Smith v. Fall River Joint Union Highschool District*, 1 Cal. (2d) 331, 34 P. (2d) 994.

United will maintain in this Court that the District Court erred in several respects in reaching the conclusion that Ohio's policy did not cover the personal liability of Gilbert: (1) by a Certificate of Insurance issued subsequent to the policy itself, Ohio stated that its coverage

applied to all automobiles owned or *operated* by its assured. (Emphasis added.) The special endorsement controlled. The printed form of the original policy was relegated to the background. As stated by this Court in *Tarleton v. DeVeuue*, 9 Cir. 113 F. (2d) 290, 132 A. L. R. 343, certiorari denied 312 U. S. 691, 85 L. Ed. 1127, 61 S. Ct. 710:

“Where a printed provision of a policy is inconsistent with a rider, the rider controls,” citing 7 Cal. Jur. Ten Year Supp. 92, Sec. 28.1.

(2) By statute in California, the Legislature undertook to and did state what a policy of insurance should contain (Sec. 381 of the Insurance Code) and in Section 383.5 defined an owner of a motor vehicle as any one named in a policy of insurance, and therefore, McKeon and Page dba Pacific Laundry were the owners of the accident vehicle for the purpose of construing Ohio's policy.

(3) Under the California law, a partnership is not an entity separate and apart from the members composing it. To the contrary, California holds to the aggregate theory of partnerships and for that reason each partner owned the property of the other.

United will further maintain in this Court that the right of subrogation does not exist in California between insurers of joint tort-feasors even though their liability is derivative only and not culpable. It is contended that this point has been settled by the Supreme Court of California and that the trial court should have held likewise in accordance therewith. It will be urged further by United, that under the California statute there was double insurance, and therefore, the liability of the two insurers should have been fixed in proportion to the limits stated in their respective policies.

IV.

ARGUMENT.

1. The District Court Erred in Finding and Holding That the Personal Liability of Gilbert Was Not Covered Under the Ohio Policy for the Following Reasons:

- (a) UNDER GENERAL ENDORSEMENT NO. 4 OF OHIO'S POLICY, ISSUED SUBSEQUENT TO THE CONTRACT ITSELF, COVERAGE APPLIED TO ALL AUTOMOBILES "OWNED OR OPERATED" BY OHIO'S ASSURED.

During the trial much time was devoted to the construction of Ohio's policy with regard to the personal liability of Gilbert. The milestone of the case was reached when both Ohio and United conceded that their obligations were equal except as to coverage applicable to Gilbert. [TR. 108, 109.] In the printed part of Ohio's policy, coverage for the benefit of persons other than those named as Assureds was limited to persons "while using automobiles owned by or registered in" the name of the Named Assured. [TR. 49.] The Certificate of Insurance attached as a rider to Ohio's policy [TR. 50, 51], clearly states "coverage applies to all automobiles owned or *operated* by the insured." (Emphasis added.) Notwithstanding the provisions of this Certificate of Insurance, the trial court held that Gilbert was not an assured under Ohio's policy, because the accident vehicle was not owned by or registered in the name of Ohio's Named Assured. [TR 61.] We submit that there is an inconsistency between the coverage stated in the Certificate of Insurance and that described in the printed part of the policy, and that the provision in the Certificate of Insurance extending coverage to all automobiles owned *or op-*

erated by the insured should control, and that Gilbert, being the employee of Ohio's Named Assured, and using the accident vehicle in the business of the Named Assured, the accident vehicle was an automobile "operated by" the insured, and the coverage of Ohio's policy extended to Gilbert and made him an insured under that policy. The trial court, in holding that Gilbert was not an insured under Ohio's policy, obviously came to the conclusion that the Certificate of Insurance did not modify the Extended Coverage Clause of Ohio's policy, and did not apply to this issue. [TR. 117, 118.] We submit that in this the trial court was in error. This Court stated clearly in *Tarleton v. DeVenne*, 9 Cir. 113 F. (2d) 290, 132 A. L. R. 343.

"Where a printed provision of a policy is inconsistent with a rider, the rider controls."

To the same effect, see also, 7 Cal. Jur. Supp. 92, Sec. 28.1.

At the time of the accident the vehicle was being used on business of Ohio's assured by a regular employee of Ohio's assured. The accident vehicle had been under the exclusive control of Ohio's assured for about one year prior to the accident. Ohio's assured had caused its trade name to be painted on the side of the truck. [TR. 81.] The Certificate of Insurance unquestionably written to clear up any doubt in the minds of the parties as to whether coverage extended to all automobiles owned by or *operated* by Ohio's assured, and certainly takes precedence over anything to the contrary in the body of the policy.



(b) UNDER THE STATUTE IN CALIFORNIA ANY PERSON NAMED IN A POLICY OF AUTOMOBILE INSURANCE IS AN OWNER OF THE MOTOR VEHICLE.

The Legislature of California adopted an Insurance Code and Section 383.5 deals with insurance on motor vehicles. The pertinent provisions of that section are as follows:

“CONTRACTS OF MOTOR VEHICLE INSURANCE: DEFINITIONS: EMBODIMENT OF CONTRACT IN DOCUMENT: DELIVERY: SUSPENSION OR REVOCATION OF AGENT’S LICENSE OR INSURER’S CERTIFICATE OF AUTHORITY: PURPOSE OF SECTION.

‘Document,’ as used in this section, means a policy or a certificate evidencing insurance under a master policy. Such policy or certificate shall conform to Section 381 and shall segregate the premiums charged for each risk insured against. Such a certificate, in lieu of specifying the risks insured against, may designate them by name or by description.

‘Owner’ as used in this section means any person who is named as an insured in such contract of insurance or document, or in a loss payable clause therein, and, whether or not he is named therein, the vendee, pledgor, or chattel mortgagor of a motor vehicle where insurance contracts subject to this section are procured with respect to the motor vehicle by or on behalf of either party to the purchase, pledge, or mortgage.

Every contract of insurance against hazards incident to ownership, maintenance, operation and use of motor vehicles shall be embodied in a document.

\* \* \* \* \*



The purpose of this section is to prevent fraud or mistake in connection with the transaction of insurance covering motor vehicles and in furtherance of that purpose the commissioner may make reasonable rules and regulations therefor.”

Therefore, under Section 383.5 of the Insurance Code, McKeon and Page dba Pacific Laundry were the owners of the accident vehicle. Therefore, Gilbert, their agent and servant, while driving with their permission and in the course of his employment, was protected by Ohio's policy, and became an additional insured under the Extended Coverage clause of that policy. The holding of the District Court to the effect that Ohio could subrogate against Gilbert as a negligent employee of its insured, was clearly erroneous. It is elementary that one cannot subrogate against himself.

(c) UNDER THE AGGREGATE THEORY OF PARTNERSHIP AS IT OBTAINS IN CALIFORNIA THE ACCIDENT VEHICLE WAS “AN AUTOMOBILE OWNED BY OR REGISTERED IN THE NAME OF” OHIO'S NAMED INSURED.

McKeon and Page dba Pacific Laundry were named as Ohio's assureds. They were partners. Under California law a co-partnership is not a legal entity. *Park v. Union Manufacturing Company* (1941), 45 Cal. App. (2d) 401, 114 P. (2d) 373. In that case Fannie S. Park was employed as a garment worker by the Union Manufacturing Company, a co-partnership composed of M. Harris and his wife, Anna Harris. The partnership business was conducted in a building owned by Harris and his wife. On February 18, 1936, while employed by the co-partnership, Fannie S. Park sustained injuries when an elevator in the building dropped from the fifth to the first floor.

Prior to the accident Harris had secured a policy of workmen's compensation insurance covering his employees in which the employer was designated as "M. Harris dba Union Manufacturing Company." Fannie S. Park filed claim for compensation with the California Industrial Accident Commission. She named Union Manufacturing Company as her employer and Pacific Employers Insurance Company was named as the insurance carrier. Thereafter in February of 1937, Fannie S. Park instituted an action for damages because of the injuries sustained in the same accident. She named as defendants Union Manufacturing Company, a co-partnership composed of M. Harris and Mrs. M. Harris as well as M. Harris and Mrs. M. Harris, individually, and Kurt Kunich, who was operating the elevator at the time of the accident. At the beginning of the trial and on motion of Union Manufacturing Company, all defendants were dismissed except M. Harris. Trial resulted in judgment against him in favor of Fannie S. Park for \$2500.00, the trial court having found, among other things, that M. Harris was the owner and operator of the M. Harris building; that he was not the employer of Fannie S. Park on February 18, 1936, and that Union Manufacturing Company by whom the plaintiff was employed at the time of the injury was a separate and distinct entity. On appeal, the judgment and findings of the trial court were reversed. It is believed that the language of the Court in that case applied with equal force to the facts in the case at bar and for that reason quote at length from the opinion, as follows, pages 375, 376, 114 Pac. (2d):

"In order to answer the questions thus presented, it should first be determined whether the Union Manufacturing Company, a co-partnership composed of M. Harris and Anna Harris, is an entity separate

and distinct from M. Harris, as owner of the building in which the accident occurred.

Appellant, when called as a witness under Section 2055 of the Code of Civil Procedure, testified that he was the owner of a seven story building, commonly known as the Harris Building, which was occupied by the Union Manufacturing Company except for the ground floor and three rooms on the third floor; that the Union Manufacturing Company in February of 1936 paid \$1,800 per month rental to the M. Harris Building; that this rental was paid directly to him, said appellant. Later in the trial, said witness was asked by his attorney to explain to the court the manner or process by which payment of said rentals was made, whereupon said witness stated: 'When I made a loan on the building, the company demanded a statement of how much the building is bringing in, and for that purpose we established the value of the rentals and how much that building is bringing in so I could make the loan, and not for any other reason. In fact, the lot that I purchased was purchased with money from the Union Manufacturing Company.' He was then asked to explain what connection he had with the Union Manufacturing Company, to which he replied: 'Well, the Union Manufacturing Company was in business for 15 years, and we needed larger quarters, and I took the money from the Union Manufacturing Company and purchased a lot; then I borrowed money for the Union Manufacturing Company to put up the building. As a matter of record, we have to keep books to know how much that building is bringing in and how much the business is bringing in, but it is being done by the same bookkeeper by the same management.' He also testified that no one except himself and his wife had any interest in the Union Manufacturing Company,

and that the M. Harris Building stood in his name. Two policies of insurance were introduced in evidence, in one of which the named insured appears as 'M. Harris, doing business as M. Harris Building'; and in the other as 'M. Harris dba Union Manufacturing Company.'

A search of authoritative sources upon the subject of the entity theory of partnerships discloses the following: 'A partnership is not ordinarily regarded as strictly a legal entity distinct from the individuals composing it and having an independent existence nor as a person, either natural or artificial, nor as a being, or a legal being. However, there is some authority to the contrary, holding broadly that a partnership is an entity separate and apart from its members, or that it is a legal but not a social entity, and it has even been said that it is recognized in law as a person, or at least as a *quasi* person. Further, whether or not a partnership is to be regarded as a distinct entity for all purposes, the courts frequently have so regarded it with reference to particular rights and obligations, particularly courts of equity, and there is a general tendency at this day to complete the recognition of a partnership as a body of itself with its own means appointed to its own debts. So the entity of the partnership as such has frequently been recognized with reference to its ownership of property, the taxation of its property, its contracts with third persons, the rights of its creditors, including rights under insolvency and bankruptcy laws, the exemption of its property from execution for the debt of the partnership or of individual partners, and its liability for tort, although it cannot, as such be guilty of a crime.' 47 Cor. Jur. 747, Sec. 172.

'The theory that a partnership is a legal entity distinct from and independent of the persons composing

it has been repeatedly affirmed. In the Roman law the partnership was known as "*societas*," and in those jurisdictions where the Roman law is the basis of the jurisprudence, the entity of the partnership is frankly recognized, and actions are even allowed between the partner and the partnership. It has been said that the notion that the firm is an entity distinct from its members has grown in popularity, and that the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. Furthermore, the current authorities construing and applying the Bankruptcy Act of 1898, 11 U. S. C. A. Sec. 1 *et seq.*, agree that, in contemplation of that statute, a partnership is a distinct separate entity from the individual partners who compose it, and that a proceeding in bankruptcy may be prosecuted against the partnership, and it may be adjudicated a bankrupt without any proceeding prosecuted against the individual members of the partnership and without their being adjudicated bankrupts individually, and similarly that the individual partners may be adjudicated without involving the partnership. On the other hand it has been asserted that the common law does not recognize a partnership as an entity, that a partnership should not be so considered, and that it is to be regretted that decisions on the marshaling of assets under the present bankruptcy law have led to a resurrection of the term. *Amid this conflict of authority the most approved opinion appears to be that which recognizes that a partnership is not an entity like a corporation and that it is not a legal entity, having, as such, a domicile or residence separate and distinct from that of the individuals who constitute it. Although a partnership is not a person, it may, as a matter of fiction, be treated as a quasi person or entity for certain purposes such as*



the keeping of partnership accounts and in marshaling assets. In common law jurisdictions this entity for such purposes may be recognized, at least in courts of equity; and it must be conceded that in some jurisdictions the law recognizes a partnership as a person distinct from the individual members of the firm, for it has been held that partners are not directly liable on a debt of the partnership, but that their liability arises out of their connection with the firm, and that it is only traceable through the firm and must be established by a judgment against the firm.' 20 R. C. L. 804, Sec. 6. (Emphasis added.)

'In most respects a partnership is but a relation, with no legal being distinct from the members who comprise it. It is not a person, either natural or artificial. Thus a partnership, as such, cannot be guilty of crime, but the guilt attaches to the delinquent member or members. *But for some purposes, a partnership is regarded as an entity.* One partner may verify an affidavit in the firm name, although a statute requires "all partners" to make the affidavit. And for the purposes of Section 388 of the Code of Civil Procedure allowing associates in business under a common name to be sued by it and their joint property bound by the judgment, a partnership is regarded as a legal entity, distinct from its members, against which judgment may be entered. This is true though the firm has in fact been dissolved after incurring the obligations sued on, and before commencement of the suit. Again, for the purpose of filing an insolvency petition, a partnership has been regarded as an entity and if it did business in the state and one of its members resided therein, the firm was considered to be a resident within the Insolvency Law, though one member resided abroad.' 20 Cal. Jur. 680, Sec. 3. (Emphasis added.)



‘Courts of jurisdictions denying the existence of a firm entity distinct from its component members, ordinarily deny the separate existence of two or more firms with an identical membership notwithstanding they may be conducting business under separate names. *But the rule has been so far relaxed as to permit recognition of separate existence under exceptional circumstances.*’ 47 Cor. Jur. 750, Sec. 174. (Emphasis added.)

A recapitulation of the authorities cited in the foregoing reveals that in the states of Iowa, Louisiana, Oklahoma, Pennsylvania, South Carolina, Tennessee and Vermont, a co-partnership is regarded as a separate entity, distinct from the individuals of which it is comprised and that the Courts of New York, Minnesota, Mississippi and Texas do not recognize a co-partnership as an entity apart from exceptional situations.

In this latter category is the holding in *Fidelity Phoenix Fire Ins. Co. v. Howard*, 1938, 182 Miss. 546, 181 So. 846, to the effect that a partnership with identical partners under one partnership name is the same partnership when conducting some other portions of its business under another name, and the separation of bookkeeping and of all operations and details thereof is immaterial since ownership and ultimate control are still in the partners who compose the firm.

That California follows the latter, rule, *i. e.*, non-recognition of the entity theory of partnerships, is evidenced by the opinion in *Reed v. Industrial Acc. Comm.*, 10 Cal. 2d 181, 63 P. 2d 1212, 114 A. L. R. 720, in which case a policy of workmen’s compensation insurance issued to an employer who subsequently entered into a partnership was held to cover an injury to an employee of the partnership, the court

holding that the partnership was not a distinct entity apart from the members thereof, that an employee of the partnership was an employee of each of the partners; that no individual partner could escape liability on the ground that the partnership only and not the individuals composing it could be held liable, and that since the partner who procured the insurance was liable for the injury to the employee of the partnership, the insurer was liable on its policy.

“Since it has not been shown to the satisfaction of this court that the circumstances present herein are exceptional, there appears to be no good reason, for a deviation from the rule announced in the Reed case, *supra*. Consequently, appellant’s contention, that the evidence is insufficient to sustain the finding of the trial court to the effect that the Union Manufacturing Company possessed a separate and distinct entity from that of M. Harris, must be sustained.

“For the reasons stated, the judgment appealed from is reversed.”

It is submitted that the above is conclusive authority for our proposition that the partnership of McKeon and Page dba Pacific Laundry is not a separate legal entity, and that Page therefore is a named assured within the meaning of Ohio’s policy. Page is the same individual, irrespective of the fact that he is a partner in Pacific Laundry. General Endorsement No. 3 upon which Ohio placed so much importance at the trial [TR. 51] “excluding all activities of G. B. Page which are not specified therein” is fully answered by United’s argument that Page as a co-partner of McKeon and Page, and named as such in Ohio’s policy, was the owner of the vehicle, and the activity in which the vehicle was being used at

the time of the accident, was not such an activity as to bring it within the purview of that Endorsement.

Upon the trial Ohio relied on *National Automobile Ins. Co. v. Industrial Accident Commission*, 11 Cal. (2d) 689, 81 P. (2d) 926. There is a clear distinction between the rule stated in the *National Automobile* cases and the rule relied on by United as laid down in *Park v. Union Manufacturing Company*, *supra*. In the *National Automobile* case the insuring clause clearly stated the particular business enterprise to be covered. Neither, was there a statute such as Section 383.5 of the Insurance Code, *supra*, applicable. It is submitted that the aggregate theory of partnership still exists in California and that here, not only was each partner an owner of the partnership property, but also that Page was Page wherever found. He was a member of McKeon & Page dba Pacific Laundry; he was also an owner of the accident vehicle. We submit, therefore, that Page, being an owner, and also a named assured of Ohio, is brought squarely within the provisions of the Extended Coverage clause of Ohio's policy, and that the accident vehicle was an automobile "owned by or registered in the name of" Ohio's Named Assured, thus extending coverage under said clause to Gilbert—a person using the automobile with the permission of Ohio's Named Assured.

In 40 *Am. Jur.* 202, *Partnership*, Sec. 107, it is stated:

"The personal property of a partnership is owned not by the partners individually, but by the partnership. By the contract of partnership, the partners acquire a joint interest in the personal effects of the

partnership. Each partner is possessed *per my et per tout*, that is, the interest of each member of a partnership extends to every portion of its property, and is a joint interest in the whole and not a separate interest in any particular part. This is true both of property contributed by each partner as well as that included in his own contribution. This gives rise to the rule elsewhere considered that each partner has an equal right to the possession and control of the joint property."

**2. The Right of Contribution Does Not Exist in California Between Joint Tort-Feasors. Neither Does the Right of Subrogation Exist Between Liability Insurers of Joint Tort-Feasors.**

In this case the liability of Page is vicarious and arises only by reason of his registered ownership of the accident vehicle. His liability is based only upon Section 402 of the Motor Vehicle Code of California, *supra*. He was in no way culpable. His liability is derivative. Likewise the liability of McKeon and Page dba Pacific Laundry is derivative. They were not culpable. Gilbert left the State of California and, though named in both the action for damages in the State Court and in this proceeding, was never served. Therefore, as between two joint tort-feasors whose liability is derivative only, should there be contribution? Does either have the right to subrogate against the other? Clearly, Page had the right of subrogation, under the provisions of Section 402 of the Vehicle Code, against Gilbert, but Gilbert, being an employee of a co-partnership of which Page was a member, United did not urge that Ohio was liable under the statute. Ohio, however, urged strenuously that it was entitled to subrogate against Gilbert and reach the proceeds of United's policy.

The rule is well settled in California that there can be no subrogation among joint tort-feasors. *Adams v. White Bus Line*, 184 Cal. 710, 195 Pac. 389.

It is equally well settled in California that the right of subrogation does not exist in favor of the insurer of a joint tort-feasor against another. *Smith v. Fall River Joint Union High School District*, 1 Cal. (2d) 331, 34 P. (2d) 994. In that case the defendants in the tort action were the School District, Fitzwater, driver of the school bus, and Pratt, driver of a private automobile. The injured, California Smith, recovered judgment against the three defendants above named. Independence Indemnity Company was the liability insurance carrier on the School District and the defendant Fitzwater. It took an appeal from the judgment in the damage case and also became surety on the supersedeas bond. The judgment was affirmed on appeal and the insurer paid the full amount of the judgment. Thereafter, it sought to recoup its loss against Pratt, one of the joint tort-feasors. Pratt thereupon moved the Court for an order satisfying the judgment as to him. The Supreme Court held that under these circumstances the payment of the judgment by Independence Indemnity Company operated as a complete satisfaction thereof as to the defendant Pratt. In reaching this decision, the Court stated:

"The appellant, as the indemnitor of the two appealing defendants, was liable for the payment of the judgment against them and such payment gave it no recourse against the respondent as the joint tort-feasor of said defendants for the amount so paid or for any part thereof. It would be most inequitable to permit the appellant to now assert that it paid the judgment as the surety on the appeal bond and not as the indemnitor and thus by application of equitable principles of subrogation escape the liability



which, for an adequate consideration, it had undertaken to discharge, and force such liability upon another who was not a party to said appeal bond and who received no benefit whatever from its execution and delivery" (34 P. (2d) 998.)

"By giving the bond on appeal with itself as surety, it did not in any way enlarge its liability in the premises. It was legally bound to pay the judgment before giving the surety bond. It was no more so after it had executed and delivered the stay bond. The only conceivable change in its legal status which the giving of the bond by itself might work, would possibly be in relation to its rights against the respondent herein. If appellant's contentions are to be sustained, then the Indemnity Company, although it had no right even of contribution against the respondent before the appeal, by taking the appeal and furnishing an appeal bond with itself as surety, created a right against respondent, making him liable not only for contribution, but for the entire amount of the judgment. We do not believe that under the laws of this state the appellant by such indirect methods can enrich itself at the expense of another." (34 Pac. 997.)

A case in which the issues were similar to those raised in this controversy is *Universal Indemnity Ins. Co. v. Caltagirone, et al.*, 119 N. J. Eq. 491, 182 Atl. 862. In that case the indemnity insurer of one of several joint tort-feasors sought to escape the rule that there can be no contribution or subrogation among them by applying to the court for relief, before the payment of the judgment, in somewhat the same manner that Ohio seeks to escape its obligation in this case. In denying the claim of the insurer, the court used the following language:

"The facts in the instant case closely approximate those present in *Fiorentino v. Adkins*, 154 A. 429,



430, 9 N. J. Misc. 446 (Supreme Court). There the insurance carrier of one joint tort-feasor paid a judgment based on a tort action, took an assignment thereof, and sought contribution by issuing execution against the other joint tort-feasor. The court said as to the position of the insurance carrier: 'It stands in its insured's shoes. There is a public policy behind the rule against contribution amongst the joint tort-feasors, and we are unable to see the distinction, in the application of the rule, between a joint tort-feasor and one who, by contractual undertaking, stands in his place. The money paid by the Indemnity Company for the judgment was, in theory, the money of its insured. It was the accumulated premiums paid by the insured against the day when the latter would be called upon to suffer such a loss.'

"This pronouncement of the Supreme Court, which we approve, is, we think, applicable to the instant case.

"(4) The complainant Insurance Company claims a distinction from the above-cited cases, in that here there has been no payment of the judgment, no assignment taken, and no right asserted which has been secured through its insured. This distinction is more apparent than real. Whether the relief sought be based on an assignment or not, whatever the method used to affirmatively seek contribution, the result will be the same; and that result will inure to the benefit of the insured joint tort-feasor. Equity should not be invoked by methods of indirection to nullify a positive rule of law.

"Counsel for the Insurance Company cites decisions of other states, and contends that the rule against contribution should not be applied against the Insurance Company, since its liability arises through a technical rule of law; that the Insurance Company

is innocent of any personal fault or culpability; and that while there can be no contribution between joint tort-feasors where there is actual wrongdoing, on the ground that the law will not undertake to adjust the burden of misconduct, such principle cannot and should not apply against one who, like itself, is entirely innocent of wrong, because the very reason upon which the rule is founded, is lacking.

“The answer to this is that the liability here does not arise through a technical rule of law but because of specific contractual undertaking. Furthermore, what the law may be in other jurisdictions is unimportant in view of the fact that the courts of our state, including this court, have repeatedly held that whether the tort is an intentional wrongdoing or a mere act of carelessness or negligence does not alter the rule that the right of contribution does not exist.”

In California, an injured party is not required to elect as between which of two joint tort-feasors he will proceed. This applies in cases where the joint tort-feasors are master and servant. *Schilling v. Central California Ins. Co.*, 45 Cal. App. (2d) 288, 114 P. (2d) 34. In the *Schilling* case, the court considered and disposed of a similar contention to that being made by Ohio in this case. It was there urged that the insurer for the employer had a secondary liability to that of the insurer for the employee whose negligence caused the accident. That case is authority for the proposition that there are no degrees of liability among joint tort-feasors. The case is also authority for the proposition that where double insurance exists, the two insurance carriers should be held liable on a pro-rata basis. This will be discussed further in the following subdivision of this argument.

**3. There Is Double Insurance, Admittedly, and by Statute and Therefore Both Companies Are Liable in Proportion to the Limits of Liability Stated in the Respective Policies.**

Regardless of the other points heretofore urged in this brief, and irrespective of claimed error of the trial court in holding that Ohio did not cover the personal liability of Gilbert, it is believed that the case should turn on the proposition of double insurance. Section 590 of the Insurance Code of California provides as follows:

“A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest.”

United has appealed for the reason that the decision of the court below places the entire responsibility upon it. Ohio is subrogating and is entitled to subrogate against United under the findings and judgment of the trial court. United believes this to be clearly erroneous and that where double insurance exists the two carriers should be held liable on a proportionate basis.

There are two important decisions by the California courts on this subject. In *Consolidated Shippers, Inc. v. Pacific Employers Ins. Co.* (1941), 45 Cal. App. (2d) 288, 114 P. (2d) 34, Commercial Standard Insurance Company issued a policy of liability insurance whereby it agreed to insure M. L. Harvey and/or Consolidated Shippers, Inc., against liability imposed by law arising from the ownership, maintenance and use of a Chevrolet truck which was owned by Harvey. The limits stated in the policy were \$5,000.00 as applicable to injuries to or death of one person, and \$10,000.00 for injuries to or death of more than one person in one accident. Pacific Employers Ins. Co. also issued a policy of liability insur-

ance by the terms of which it insured Consolidated Shippers, Inc. only, against liability imposed by law by reason of the operations of all automobiles and trailers *other than those owned by it* which were used for transporting merchandise on a contract basis on account of or for Consolidated Shippers, Inc. The latter policy was further limited to such loss as might result to Consolidated Shippers, Inc. from the operation of trucks and trailers by independent contractors who had executed a prescribed form of blanket hauling contract. The limits of liability under the latter policy were \$5,000.00 property damage and \$10,000.00 for injury to or death of more than one person.

Each policy contained a provision for the proration of insurance, providing in effect that if the insured carried other insurance against the same loss, the insurer would not be liable for a larger proportion of the entire loss than the amount named in the policy bore to the entire amount of collectible insurance.

While both policies were in effect, Harvey was transporting merchandise in his Chevrolet truck covered by the Commercial policy pursuant to contract with the Consolidated Shippers, Inc. and became involved in an accident resulting in death of two persons. The accident occurred in Arizona and two actions to recover damages were instituted against Harvey and Consolidated Shippers, Inc. Prior to trial date, the parties stipulated, without admitting liability, to a compromise judgment being entered in favor of the plaintiffs in the damage actions for an aggregate amount of \$11,000.00.

In order to comply with the terms of Arizona law regarding interstate motor freight carriers, Harvey entered into an agreement with Consolidated Shippers, Inc. reciting that he had leased the Chevrolet truck to the cor-

poration. The agreement was executed and filed in the State of Arizona prior to the happening of the accident. Evidence was introduced on the trial of the case in an effort to show that, notwithstanding the apparent relationship between Harvey and the corporation arising out of the lease agreement, at the time of the accident Harvey was actually an independent contractor and not an employee of Consolidated. Upon such evidence the trial court found that Commercial was primarily liable under its policy and that Pacific's policy was secondary insurance which did not attach or become collectible until the limits of Commercial's policy had been exhausted.

On appeal, the judgment of the trial court was reversed, as disclosed by the following quotation from the opinion, pages 35, 36, 37, 114 P. (2d):

"The contention of Commercial that the finding or conclusion of the trial court to the effect that its policy afforded primary coverage and Pacific's secondary coverage is not supported by the evidence and is contrary to law must be sustained. So far as plaintiff is concerned, the risk covered by each policy was the same. The Commercial policy afforded plaintiff insurance against loss resulting from any liability arising out of the maintenance or use of the Chevrolet truck. By the Pacific policy plaintiff was insured against loss resulting from any liability arising out of the operation of any truck, although it was not specifically described in the policy. While it is true that the Commercial policy covered Harvey as well as plaintiff, there can be no doubt so far as plaintiff is concerned that the risks covered by both policies were co-extensive. If the policies had in effect the same coverage, neither could be primary but both insurers were jointly liable. Each policy provided expressly that if the assured carried other in-



insurance against a loss covered by the policy, then the insurer would not be liable for a larger proportion of the entire loss than the amount payable under its policy bore to the total amount of collectible insurance. Neither contained any provision to the effect that the insurance afforded thereby was to be considered as excess insurance in the event the assured carried other collectible insurance covering the same loss. It is obvious that if insurance is prorata it cannot at the same time be excess insurance as to the same loss. The effect of a provision for the proration of an insurance loss is to require the several insurers of the same risk to share the total loss. If a policy be considered as excess insurance the idea of sharing the loss is negatived, for the excess insurer is liable only for the amount of the loss in excess of the limits of other valid and collectible insurance covering the same loss. By holding that Pacific was an excess or secondary insurer, the trial court completely vitiated the provision for the proration of loss as expressed in the policy. An insurance policy is to be construed like any other contract, and where there is no ambiguity in the language used it must be construed in accordance with the intention of the parties. *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 26 P. 872, 23 Am. St. Rep. 460. The intention of the parties to the Pacific policy, as expressed in the provision for proration of the loss, being unambiguous, must govern. Had the parties intended the Pacific policy to be excess insurance, it would have been a simple matter to express such contention by appropriate language in the policy. Not having done so, they are bound by the express terms of the policy.

\* \* \* \* \*



Pacific contends that Harvey was primarily liable, that plaintiff was secondarily liable and that the judgment correctly determines the respective liabilities. No California case is cited in support of this proposition and we know of no law in this state fixing degrees of liability in relation to the joint liability for torts. From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone (*Schilling v. Central California Traction Co.*, 115 Cal. App. 30, 1 P. 2d 53), or against both jointly, it would seem that there could be no such thing as primary and secondary liability. Moreover, the court made no finding on the issue of primary and secondary liability as between Harvey and plaintiff, and in fact made no finding concerning the relationship existing between Harvey and plaintiff out of which the latter's liability arose. In view of our conclusion that both policies insured the same risk so far as plaintiff is concerned, the fact that plaintiff's liability may have been primary or secondary becomes immaterial. Regardless of the nature of such liability, any loss resulting therefrom was covered by both insurers.

Judgment reversed."

Again in *Lamb v. Belt Casualty Co.*, 3 Cal. App. (2d) 624, 40 P. (2d) 311, the California courts hold to the equitable rule of pro-rating the liability of insurance carriers, where double insurance is found to exist. In that case the insured operated a truck and trailer. He carried a policy of automobile insurance with Belt Casualty Company on the trailer with limits of \$5,000.00 applicable to injuries or death of one person and \$10,000.00 for two or more persons in one accident. American Indemnity Company issued a policy of automobile liability insurance

on the truck in which its limits were stated to be \$50,000.00 as applicable for injuries or death of one person and \$100,000.00 on one accident. American Indemnity policy provided specifically "damage done to or by said trailer shall not be construed to be covered hereunder." That policy contained the further provision:

"No recovery shall be had under this policy if at the time a loss occurs there be any other insurance, whether such other insurance be valid and/or collectible or not, covering such loss, which would attach if this insurance had not been effected; provided, if the assured carries a policy of any other insurer covering concurrently a claim covered by this policy under property damage and/or liability peril clauses herein he shall not recover from the Company a larger proportion of any such claims than the sum hereby insured bears to the whole amount of such valid and collectible concurrent insurance."

The Belt Company policy contained the following provisions:

"If the named assured has any other insurance applicable to a claim covered by this policy, the company shall not be obliged under this policy to pay a larger proportion of or on account of any such claim than the limit of the Company's liability under this policy, applicable to such claim, bears to the total corresponding limits of the whole amount of valid and collectible insurance. If any other person, firm or corporation included in this insurance is covered by valid and collectible insurance against a claim also covered by this policy, the said other person, firm or corporation shall not be entitled to protection under this policy."

While both policies were in effect, two persons while riding in another automobile collided with the rear of the trailer at night, it being drawn and propelled by the truck at the time. The tail light connection between the truck and trailer had broken, and therefore, the trailer was unlighted. Absence of a tail light was the ground upon which recovery of damages was had.

At page 315 of 40 P. (2d), the court points out:

“The total liability of the insured on account of the judgments in the two damage actions amounted to \$14,632.07. In the absence of other insurance, the American Indemnity Company would be liable to indemnify the insured in this amount on the one hand, and the Belt Casualty Company and Lloyds of London on the other. The assured, however, having contracts of insurance with different companies insuring against the same liability, the provisions of the policies relating to such situations must be looked to and the liability be apportioned according to the contracts.”

Having determined that the policies of the two companies named, were the only ones applicable, the court proceeded as follows:

“This leaves only the policies of the American Indemnity Company and of the Belt Casualty Company to be considered, each of which provides that the liability thereunder shall be that proportion of the total liability which the limits of the policy bear to the whole amount of such collectible insurance. The trial court applied this method in apportioning the liability, which method we hold to be correct.”

There is no important distinguishing feature to be found between the case just cited, and the proposition under

consideration here. In that case the named insured was identical in both policies under consideration by the Court. In the instant case, Page is also named as an insured in both policies. In *Lamb v. Belt Casualty Company, supra*, the American Indemnity Company policy provided in part (40 P. (2d) 311, 315):

“No recovery shall be had under this policy if at the time a loss occurs there be any other insurance, whether such other insurance be valid and/or collectible or not, covering such loss, which would attach if this insurance had not been effected; \* \* \*.”

Notwithstanding such provision, the trial court applied the rule that each company was liable for “that proportion of the total liability which the limits of the policy bears to the whole amount of such collectible insurance.” The reviewing court affirmed.

4. **The Court Erred in Failing to Follow the Rule of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.**

United most seriously urges that the District Court erred in several respects by failing to follow the rule of *Erie Railroad Company v. Tompkins, supra*. The most grievous error of the trial court was in disregarding the California rule which has been followed by this Court that a rider attached to a policy takes precedence over the language contained in the body of the contract. (*Tarleton v. DeVcune, supra*.) By its failure to apply that rule, the trial court limited the coverage of Ohio's policy and restricted it to cover only McKeon and Page dba Pacific Laundry, denying the existence of the broader coverage admittedly contained in Ohio's policy, had the vehicle been

registered to the name of McKeon and Page dba Pacific Laundry. In this, it is contended that the Court unduly restricted Ohio's policy.

United maintains further that the trial court failed to follow the correct rule with regard to partnerships in California and also failed to apply the provision of the Insurance Code to the effect that one named as insured in a policy of insurance is an owner within the meaning of the statute applicable to all contracts of insurance covering motor vehicles. (Section 383.5, Insurance Code of California, *supra*.)

United further contends that the Court also erred by failing to follow the two decisions of the California courts with respect to double insurance discussed in the foregoing subdivision of this argument. (*Consolidated Shippers v. Pacific Employers Ins. Co. supra*, and *Lamb v. Belt Casualty Co., supra*.) As this Court has held, both policies of insurance were California contracts and the law of California should have been applied. (*Gates v. General Casualty Co. of America*, 9 Cir., 120 F. (2d) 925.)

### Conclusion.

In conclusion, it is respectfully submitted that the District Court erred in the respects pointed out in the foregoing brief. United appeals from the holding of the Court that it is required to make Ohio whole for any loss it may sustain. The companies have settled the case, each paying one-half of the loss. [TR. 208.] United does not find particular fault with its actual position as matters now stand, but does earnestly complain of its obligation, under the decision of the District Court, to reimburse Ohio fully as soon as Ohio reduces its purported claim

against Gilbert to judgment. At the risk of stating a fact outside the record, it is felt that this Court should be fully informed, and in candor and fairness, United now informs the Court that Ohio has an action pending in the District Court of Douglas County, Nebraska, against Gilbert and that it looks to United to satisfy any judgment it obtains in said action against Gilbert.

The principles of equity have not been applied by the District Court. There is no equity or justice in relieving Ohio from the responsibility it contracted for when issuing its policy to McKeon and Page dba Pacific Laundry. As pointed out by the Court in *Universal Indemnity Ins. Co. v. Caltagirone et al.*, *supra*, the money paid by the Indemnity Company for the judgment was the accumulated premiums paid by its insured against the day when the latter would be called upon to pay a loss.

All of which is

Respectfully submitted,

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No. 11799

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

UNITED PACIFIC INSURANCE COMPANY, a corporation,  
*Appellant,*

*vs.*

THE OHIO CASUALTY INSURANCE COMPANY, a corporation;  
R. H. McKEON, individually; GEORGE B. PAGE, individually;  
R. H. McKEON and G. B. PAGE, doing business under the fictitious name of Pacific Laundry and Dry Cleaners;  
GEORGE B. PAGE, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company;  
FLOYD GILBERT, ROBERT ECHOLS and BEVERLY ECHOLS,  
*Appellees.*

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**BRIEF OF APPELLEE THE OHIO CASUALTY INSURANCE CO.**

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No. 11799

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

UNITED PACIFIC INSURANCE COMPANY, a corporation,  
*Appellant,*

*vs.*

THE OHIO CASUALTY INSURANCE COMPANY, a corporation;  
R. H. McKEON, individually; GEORGE B. PAGE, individually;  
R. H. McKEON and G. B. PAGE, doing business under the fictitious name of Pacific Laundry and Dry Cleaners;  
GEORGE B. PAGE, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company;  
FLOYD GILBERT, ROBERT ECHOLS and BEVERLY ECHOLS,

*Appellees.*

---

**BRIEF OF APPELLEE THE OHIO CASUALTY INSURANCE CO.**

---

**Statement of Facts and Issues.**

The parties are referred to herein as United and Ohio. While all of the facts are stated below and supported by references to the record, we take the liberty of preceding the statement with a brief summary which highlights the issues.

A negligent tort feasor by the name of Floyd Gilbert caused a traffic accident. At the time he was driving a vehicle owned by A (insured with United), and was acting as an agent of A and B (insured with Ohio). Liabili-

ty was thus incurred by A as the owner of the vehicle and by A and B as employers of the driver. The liability of each has been fully discharged by their respective insurers, the parties to this appeal. As a result A, and A and B, have causes of action against Gilbert to recoup their respective losses. It is admitted that United insures Gilbert. Ohio, having discharged the liability of A and B, is entitled to recoupment, by way of subrogation to the rights of its assureds A and B, against Gilbert, unless it also insures Gilbert. This is the only issue on this appeal—does Ohio insure Gilbert?

As appears below, the issues raised by United in its brief do not exist at all in this case, with the single exception of the question whether Ohio insures Gilbert.

There is no issue whether or not the trial court followed the law of California as required by *Eric Railroad Company v. Tompkins*, 304 U. S. 64, relied on by United, because the trial court in every instance clearly followed and applied the law as established by the Supreme Court of this state. (Argument VIII, post.) So far as it has been possible to discover no jurisdiction has adopted any different rule.

There is no issue of contribution between tort feors. (Argument III, post.) Ohio's right, protected by the present judgment, is to recoup from the insurer of the tort feor in accordance with the universal rule that an employer may recoup from an employee whose negligence has caused him to incur a liability.

There is no issue of double insurance, as no double insurance existed here. (Argument IV, post.)

There is no issue as to whether the trial court failed to give precedence to the provisions of a rider attached to



an insurance policy because the rider relied on by United was obviously inapplicable, was found by the Court so to be, and is only partially quoted by United to make its point. The rider which was applicable was given effect by the judgment of the trial court. (Argument VI, I, post.)

All of the facts of this case were established by stipulation [Tr. 34-54] and are as follows:

One George B. Page, also known as G. B. Page, was at all material times engaged in various enterprises in various parts of California, in some as an individual and in others in partnership [Stipulation par. 5, Tr. 37].

Some of his activities were conducted in partnership with one R. H. McKeon [Stipulation par. 5, Tr. 37]. As to these activities Page, together with McKeon, applied for insurance with Ohio and received it [Stipulation par. 4, Tr. 36].

To cover his activities as an *individual* and in other activities expressly excluded from Ohio's coverage (as appears below) Page sought and obtained insurance from United. United's policy expressly insured Page as an individual and in other specified connections as appears below [Stipulation par. 3 (a), Tr. 35].

The foregoing coverages are unmistakably expressed in the two policies. Thus Ohio's policy provided that the named assureds are:

"R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners, 110 State Street, Santa Barbara, California;

"R. H. McKeon and G. B. Page dba Fashion Cleaners, 1041 Sierra Highway, Lancaster, California;

“R. H. McKeon and G. B. Page dba Mission Laundry & Cleaners, 222-224 N. Monterey Street, Gilroy, California.” [Stipulation par. 4 (a), Tr. 36.]

The Ohio policy further provided by endorsement or rider, in typewriting, as follows:

“It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; or his liability in connection with other business activities as an individual, a member of other partnerships a receiver, a director, or an executive officer of a corporation.” [Stipulation par. 4 (b), Tr. 36.]

On the other hand United’s policy named as assureds the following (emphasis added):

“George B. Page *individually* and dba Mission Linen and Towel Supply Company,

“H. B. Page individually and dba Model Linen Supply Co.,

“George B. Page dba Modern Linen Supply Company.” [Stipulation par. 3 (a), Tr. 35.]

United’s policy contained no endorsement rider or other provision modifying the foregoing.

It will be noted that between the two companies, Page applied for and received full coverage. With Ohio for certain specified *partnership* risks (together with McKeon), *expressly excluding all others*, and with United as an *unqualified individual* and in two other specified enterprises which he conducted individually under fictitious names. Thus *McKeon and Page* insured with Ohio and *Page*, alone, insured with United. This was not a matter of chance accomplished by stereotyped printed terms of

the policies, but of obvious intention, and the intention of the parties was further clarified by the endorsement or rider attached to the Ohio policy [Stipulation par. 4 (b), Tr. 36].

As appears below (Argument I, post) the parties had a right to make a binding contract differentiating the individual and partnership capacities of the insured *for insurance purposes*. (*National Automobile Insurance Company v. I. A. C.*, 11 Cal. (2d) 689; *National Automobile Insurance Company v. I. A. C.*, 11 Cal. (2d) 694.)

This case presents no controversy between an insurer and an insured, nor between an insurer and a claimant. The rights of the insureds have been fully protected exactly as contemplated in their policies and the demands of the claimants have been fully satisfied. Neither insurer denied its obligation to its named assureds. The only relevant question raised by United is whether Ohio as well as United, which admittedly does so, insures another party, Gilbert, as an additional assured.

The claim arose from an automobile accident occurring on January 16, 1946, in which parties by the name of Echols were injured. It is stipulated that the accident was caused by negligence on the part of one Floyd Gilbert, a truck driver [Stipulation par. 2 (a) and (c), Tr. 34-35]. At the time of the accident Gilbert was acting as an employee of R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners (assureds of Ohio) and was driving a truck owned by George B. Page dba Mission Linen and Towel Supply Company (assureds of United), and with the owner's permission [Stipulation par. 2 (a), Tr. 34-35]. Under these circumstances both the employer and the owner were liable and there is no

such thing as primary or secondary liability as between themselves. (*Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.*, 45 Cal. App. (2d) 288, 114 P. (2d) 34; Argument V, post.) Thus both principals and both insurers were liable to the Echols. This was conceded by the parties [Tr. 147] and found by the Court [Conclusions of Law I, II, Tr. 64]. Accordingly, each company has contributed equally to the satisfaction of the Echols' claim [Tr. 208, Appellant's Brief 8].

As noted above, the only issue is whether Ohio, as well as United, insures Gilbert. Since Gilbert is not named in either policy it follows that to be insured he must be "an additional assured" as defined therein. There is no question that he is insured by United's policy as a person "using an owned or hired automobile . . . with the permission of the named insured" therein, George B. Page dba Mission Linen and Towel Supply Company. *Accordingly it was stipulated that United does insure Gilbert* [Stipulation par. 7 (a), Tr. 38].

"Additional assureds" within Ohio's policy are, *inter alios*: ". . . with respect to automobiles owned by or registered in the name of the named assured . . . any person or organization legally responsible for the use thereof provided the actual use is with the permission of the named assured" [Stipulation par. 6 (b), Tr. 37]. (It will be noted that this clause does not include hired automobiles.) It was stipulated that McKeon and Page dba Pacific Laundry & Dry Cleaners (Ohio assureds) and George B. Page dba Mission Linen and Towel Sup-

ply Company (United's assured) were not the same enterprises but were operated separately, although G. B. Page and George B. Page are the same person [Stipulation par. 5, Tr. 37]. As noted above, hereinafter (Argument I) the Supreme Court of California recognizes the right of parties to insurance contracts to recognize a partnership entity *for insurance purposes* so that certain activities of an assured may be covered while others are excluded (*National Automobile Insurance Company v. I. A. C., supra*).

The Court found that Gilbert was not operating a vehicle "owned by or registered in the name of any named assured or person insured in or by the said policy of the Ohio" and that he was not insured thereunder [Finding XV, Tr. 60].

This Finding is supported and dictated by the fact that the "named assured" in Ohio's policy are McKeon and Page, doing business in three specified enterprises, and by the endorsement or rider *which excludes all others*. Gilbert, driving a vehicle owned by George B. Page dba Mission Linen and Towel Supply Company, was driving a vehicle owned by Page in an expressly excluded capacity and not as a named assured. The vehicle was owned by Page in a capacity squarely within Ohio's exclusion [Stipulation par. 4 (b), Tr. 36].

*It was stipulated at the trial that the Court should determine the rights and obligations of the parties with respect to Gilbert* in order to avoid multiplicity of suits and circuity of action [Tr. 146-149]. After a discussion as



to whether this question, ultimate liability through the active tortfeasor Gilbert should be decided, and after a recess to permit counsel for United to consider the matter, he stated: "We have no objection, your Honor, to the court deciding on the questions that the court feels should be decided in this case. We brought the action and we do not wish to narrow the issues. My point was perhaps more of argument than a statement of a desire for the issues to be narrowed." [Tr. 149.] Thereupon the Court proceeded to determine this, the only question in the case. United's prayer in its complaint for declaratory relief was for such relief, general and special, as the Court might determine proper [Tr. 10]. Accordingly, and from the Findings of Fact, the Court concluded and decreed that United should reimburse Ohio for all expenditures reasonably and necessarily made by it in compromising the claims of the Echols.

It is conceded that the claims of the Echols have been settled for \$10,250, of which Ohio paid \$5,125 and United a like amount [Tr. 208; Appellant's Brief 8].

United now seeks to read into the judgment a declaration that it should reimburse Ohio "as soon as Ohio reduces its purported claim against Gilbert to judgment" (Appellant's Brief 39-40).

The judgment contains no such qualification and United's present contention would repudiate the stipulation of the issues and restore the multiplicity of suit and circuity of action it was intended to avoid. Evidently United hopes successfully to defend Gilbert despite its



stipulation that his negligence caused the loss and its own decision that the settlement was reasonable and necessary, and thus avoid the consequences of the declaratory relief action which it instituted. At page 40 of its brief, United calls attention to a fact outside the record, that Ohio has served Gilbert with process in Nebraska. This was done as a precautionary measure only. Should this Court reverse the judgment herein, procedure against Gilbert directly might become necessary. As appears below, it is not necessary under these circumstances that a judgment first be obtained against Gilbert before his insurer may be liable, even in the absence of a declaratory relief decree. (*L. J. Dowell, Inc. v. United Pacific Casualty Co.*, 191 Wash. 662, 72 P. (2d) 296, pp. 306-7, pars.16-18.)

Having stipulated that its assured caused the loss through his negligence and having asked for a declaration of its rights and liabilities with respect to him, it would be a useless waste of time and money to prosecute another action in a distant state in order to afford United an opportunity to disprove what it admits to be the facts. Its stipulation of all of the essential facts and the declaration of its obligations by a court from which it sought such a declaration is certainly the equivalent of a judgment against the assured.

## ARGUMENT.

### I.

**United Cannot Rely Upon the Lack of Partnership Entity in the General Law Because Contracting Parties May, for Insurance Purposes, Recognize a Partnership Entity and They Did So Here.**

United's position may fairly be summarized as follows: (1) There is no partnership entity under the general law of California; therefore (2) Page is Page wherever found; and therefore (3) a vehicle owned by and registered to George B. Page dba Mission Linen and Towel Supply Company (United's assured) is a vehicle owned by and registered to Page as a partner in R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners (Ohio's assureds), notwithstanding the restrictive terms of the coverage ordered and supplied, so that (4) at the time of the accident Gilbert was an additional assured of Ohio as a person using an automobile "owned by or registered in the name of the named assured" in the Ohio policy. In other words, relying upon the general law of partnership, and disregarding the special rule existing where the facts are as here, United contends that the restrictive language of Ohio's policy and endorsement should be disregarded and treated as if it did not exist.

In support of its position United relies upon *Park v. Union Manufacturing Company*, 45 Cal. App. (2d) 401, 114 P. (2d) 373, holding that there is no partnership entity in California. (United might with equal effect rely upon *Reed v. Industrial Accident Commission*, 10 Cal. (2d) 191, a decision of the California Supreme Court to exactly the same effect. However, United does not cite that case because it is expressly cited and distinguished

by the California Supreme Court *on the present facts in National Automobile Insurance Company v. I. A. C.*, 11 Cal. (2d) 689, at page 691.)

It is only necessary to refer to the facts of *Park v. Union Manufacturing Company*, *supra*, to perceive that the *National Automobile* cases and not the *Park* case control in the present situation. In the *Park* case, an employee who suffered an industrial injury collected workmen's compensation from the insurance carrier of one of the constituent partners. Claiming that the partnership was an entity separate and apart from its constituent partners, the plaintiff sought to maintain an action at law against the partnership to recover common law damages for the injury sustained. It was held that a partnership does not have a separate entity in California.

The *Park* case has no application to the present facts and United's argument disregards the established law of California that *for insurance purposes* the parties to a contract of insurance may recognize a partnership entity and thus segregate one risk from another on that basis. It is decided that parties may contract exactly as *McKeon and Page* did with Ohio in the present case. In *National Automobile Insurance Company v. Industrial Accident Commission*, 11 Cal. (2d) 689, a policy of insurance (workmen's compensation) was issued to L. H. Sherbert, an individual doing business as Dixie Club Restaurant. A printed portion of the policy provided "If this policy is issued to an individual, it shall cover only his liability as an individual employer and not any liability as a member of a co-partnership or any other organization." After the issuance of the policy and before the loss occurred the assured obtained a partner but continued doing the same business in the same place and under the same name. Al-

though the Court recognized that the risk to the insurer was not increased, it was held that this circumstance was "of no moment" (p. 691). It was held that the policy did not cover the loss and the Court distinguished those decisions which reach a different conclusion on the partnership non-entity theory where the policies do not contain such express language making the distinction. Ohio's policy contains, by *typed* endorsement or rider, the most specific distinction. It will be noted that in the foregoing case there was no such endorsement; merely the printed form of the policy contained the distinction. Furthermore, there was no change in the risk, and admittedly none. In the case at bar, Page had many activities which were expressly excluded by Ohio and sufficient thereof to seek separate insurance from United to cover the same and to pay a separate premium. He had other businesses in other parts of the state. However, if for the purpose of argument it is to be assumed that the case at bar presents through Ohio's endorsement no change whatever in the risk, it is the law of California as represented by the case cited that "The fact that the assured's liability to employees of the co-partnership was no greater than that which would have attached to him had he retained the status of 'individual employer' contemplated by the policy, is of no moment in (our) determination of the coverage thereunder" (p. 691, par. 2).

In the second case cited, *National Automobile Insurance Company v. I. A. C.*, 11 Cal. (2d) 694, the same rule is strictly applied. There the policy (also one of workmen's compensation) was issued to a co-partnership and expressly provided that it covered the partners "jointly and not severally." The partnership was engaged in the taxi business. The taxi causing the injury was owned and

operated by one of the named partners and another partner not named in the policy. It was held that the loss was not covered. The Court said, among other things pertinent to the present case:

“The fact that from time to time changes in membership of the partnership entity intended to be covered were reflected in the policy, tends strongly to indicate that it was the intention of the parties that the coverage extended only to the entity made up of the parties so designated. The right of an insurer to limit its contract of coverage may not be questioned.” (Pp. 697-8.)

Each of the foregoing cases is pointed authority for the position of Ohio herein and directly repudiates United’s argument. The only attempt by United to distinguish these cases is found in this brief statement at page 25 of its brief: “In the *National Automobile* case the insuring clause clearly stated the particular business enterprise to be covered.” Not even a straw is grasped for here. Ohio’s policy pointedly states the particular business enterprises insured and removes all argument by a specific endorsement excluding all others.

So far as we are aware no other rule prevails in any jurisdiction and it seems improbable that any other conclusion could have been reached. United cites no authority to the contrary. It will be noted that although in the second of the *National Automobile* cases the Court says (p. 698): “The right of an insurer to limit its contract of coverage may not be questioned,” Ohio did not seek a limitation of its coverage in this case. The insurance was applied for by the assureds *McKeon and Page* as they wanted it and it was issued as ordered. *Page* applied to United for insurance covering risks not insured by



Ohio. (As a matter of fact Page had already obtained his insurance from United before the Ohio policy was issued. The United policy was effective September 18, 1944 [Tr. 11] and Ohio's policy became effective March 24, 1945 [Tr. 20]. From this it may be inferred that McKeon and Page entered partnership after the inception of United's policies and knew that additional insurance was necessary.) There is no reason to assume that Ohio would not have accepted all risks *and collected a premium therefore* had such coverage been desired of it. If the pointed language of Ohio's policy does not effect the clear intention of the parties, a lawful one in California, it is difficult to imagine a formula which would do so.

## II.

### If the Law Were Otherwise Absurd Consequences Would Follow.

If the law were not as declared in the *National Automobile* cases the most anomalous result would follow and an arbitrary, irrational impairment of the right of contract would result.

(1) Since, according to United's argument a partnership entity cannot be recognized *for any purpose*, no person could apply for insurance and no insurer could issue a policy, without including in the coverage every activity of the insured however extensive and diversified and however limited the premium. Every partnership policy would extend to the constituent partners individually and as members of other partnerships and every individual policy would apply to partnership activities regardless of painstaking efforts on the part of all parties to avoid such results and in spite of premium calculation on another basis. Insurers would find themselves exposed to express-



ly rejected risks for which no premium was collected and assureds provided with gratuitous coverage which they did not wish to purchase. The present case provides a sufficient illustration of the foolish result for which United argues. G. B. Page knew that he was engaged in various, scattered business enterprises and that he was exposed to certain risks as an individual which he did not share with his partner McKeon. He and McKeon applied to Ohio for coverage of their activities as partners, paid Ohio a calculated premium on that risk, informed Ohio of his other activities, had them excluded, insured them with United, and received from Ohio what he ordered. Yet according to United's argument he was fully insured by Ohio; the premium paid United was unnecessary and the express exclusions of Ohio's policy became part of its coverage. According to that argument the law thrusts this coverage upon Ohio gratuitously upon the theory that the parties were helpless even by the plainest contract to differentiate Page as a partner in three specified enterprises from Page as an individual. The facts of this case prove the fallacy of any argument that it makes no difference whether the driver is an additional assured in all instances, or not.

(2) There is another respect in which United's argument, if it received the sanction of law, would accomplish a preposterous result and it is earnestly requested that the Court carefully consider it. If a vehicle owned by Page *in an expressly excluded capacity* (as here) is owned by a named assured in Ohio's policy (McKeon and Page dba etc. *and no others*) then every person driving a vehicle owned by Page in any capacity, including those insured by United, would be an additional assured of Ohio. *In other words, Ohio would insure every driver,*

*the direct tortfeasor, of any of Page's vehicles in all of his excluded activities and would thus insure directly the very risks which it expressly excluded. Ohio would then have thrust upon it by operation of law, liability for the very losses which were expressly excluded. The agreed lawful limitations of Ohio's policy would be totally vitiated. It is obvious that a vehicle owned by George B. Page dba Mission Linen and Towel Supply Company is not a vehicle owned by McKeon and Page dba Pacific Laundry & Dry Cleaners, or by Page as a member of that firm, when all other activities of Page are excluded. Instead the car was owned squarely within the exclusion of Ohio's policy, "in connection with other business activities as an individual."* This quoted language is taken from the endorsement of Ohio's policy [Stipulation par. 4 (b), Tr. 36]. It is difficult to imagine a clearer case.

(3) *A further absurd consequence of the same variety would be that even Page, himself, would be insured by Ohio in his excluded capacities. If he is to be regarded as "Page" wherever found, then his private automobiles, covered by United when it undertook to insure "George B. Page, individually" [Tr. 44] are insured with Ohio since Page in McKeon and Page, so the argument goes, is Page unrestrictedly. Thus again Ohio's exclusions would become part of its coverage.*

(4) United's argument if sound would recoil upon itself, for if Page is Page wherever found, Ohio's coverage becomes United's coverage and United becomes the target of every argument it has directed at Ohio.

The validity of the present contracts of insurance, both with United and Ohio, is established in the law of California and attention is not directed to any contrary authority if there could be any in any jurisdiction. It is respectfully submitted that the trial court reached the only possible conclusion and that the judgment should be affirmed.

### III.

#### **No Question of Contribution Between Joint Tort Feasors Exists in This Case.**

None of the other issues raised by appellant exist in this case although they are solemnly asserted with a most confusing effect. United contends that the judgment in this case results in a contribution between joint tortfeasors. Decisions are cited (*Adams v. White Bus Line*, 184 Cal. 710, 196 Pac. 389; *Smith v. Fall River, etc. District*, 1 Cal. (2d) 331, 34 P. (2d) 994; *American Surety Co. v. Bank of Calif.*, 133 F. (2d) 160, and *Universal Indemnity Insurance Co. v. Caltagirone*, 119 N. J. Eq. 491, 182 Atl. 862) holding that there is no contribution between joint tortfeasors and that the insurer of one tortfeasor cannot subrogate against another. *Schilling v. Central California Insurance Co.* is also cited (p. 30) but the citation is that of *Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.*, which is the only one of the two discussed and it is assumed that reference is intended to the latter case.

These cases state platitudes so far as this case is concerned. Naturally no right of contribution between joint tort feors is claimed, nor any right of the insurer of one to subrogate against another. Proceeding upon the false premise that Ohio, proceeding through McKeon and Page, seeks to recoup from *Page* instead of from *Gilbert*, United attempts to invoke the rule against contribution between tort feors.

It is perfectly obvious that Ohio is not seeking to subrogate against *Page*. Nowhere in the judgment will be found any reference to a right to subrogate against *Page*. The right of subrogation is asserted against *Gilbert* and we believe it is safe to say that no decision can be found holding that an employer may not recover from his negligent employee recoupment of losses imposed upon him by the employee's negligence. In actions *inter se* the negligence of the employee is not imputed to the master.

The right of McKeon and Page (and of *Page* also) to recover from *Gilbert* sums necessarily expended in payment of *Gilbert*'s torts is unquestionable, and no contribution between joint tort feors is remotely suggested by such procedure.

As stated in *Johnson v. City of San Fernando*, 35 Cal. App. (2d) 244, at page 246:

"An employer against whom a judgment has been rendered for damages occasioned by the unauthorized negligent act of an employee may recoup his losses in an action against the negligent employee."

To the same effect is *Myers v. Tranquility Irr. Dist.*, 26 Cal. App. (2d) 385, at page 389.

(The same rule would apply where a reasonable and necessary settlement is made although the employer making such a settlement could not rely in such instance upon a judgment to prove that it was reasonable and necessary. (*L. J. Dowell, Inc. v. United Pacific Casualty Co.*, 191 Wash. 666, 72 P. (2d) 296, pp. 306-7, pars. 16-18. In the case at bar all essential facts have been stipulated by the party called upon to make recoupment and a judgment against Gilbert could establish nothing more and would be an idle act.)

*If Gilbert had a separate insurance policy with a different insurer we wonder if United could possibly make the argument it now presents to this Court?* Instead of making such an argument United itself would be doing exactly what it now contends Ohio may not do, proceeding against Gilbert and his insurer to recover its own expenditure. United admits that it insures Gilbert and therefore, unless Ohio also insures him, and we submit that it does not, Ohio is entitled to pursue its remedy, as subrogee of Page and McKeon. The only impediment to similar action by United as subrogee of Page is that United insures Gilbert and it cannot subrogate against itself.

We respectfully submit that decisions denying contribution between joint tort feors or their insurers have no remote bearing upon the present question. The trial court recognized Ohio's right of recoupment from Gilbert and not from Page.



IV.

**There Was No Double Insurance and the Court Apportioned the Loss in the Only Possible Manner.**

We are not sure that the exact meaning of United's argument in its section 3 (pp. 31 to 38) is understood and therefore a brief reply is made to every possible import of that argument.

United states (p. 31): "United has appealed for the reason that the decision of the court below places the entire responsibility upon it." *This occurred solely because United insured Gilbert and not by reason of its insurance of Page.* The liability between Ohio for *Page* and *McKeon* and United for *Page* was divided equally and, as appears below, no other division could be justified. If some other insurer, a stranger to this record, had insured Gilbert as did United, it would be obvious to all observers that it carried the ultimate tort liability and the fallacy upon which United proceeds would be unthought of. United is manifestly confused because of its dual capacity. It is the insurer both of *Page* and of *Gilbert*. In its capacity as insurer of *Page* it complains of its liabilities as insurer for *Gilbert*, a *non sequitur* which would be avoided if a third insurer occupied the position of *Gilbert's* carrier.

*There was no double insurance in this case.* Double insurance is defined in Section 590 of the Insurance Code of California, quoted by United at page 31, as existing "where the *same person* is insured by several insurers." If either *Page* or *McKeon* and *Page*, were insured in the same company, there would be double insurance but such a situation can arise only if this Court rejects the California law and holds that *Page*, as an individual, was



insured by Ohio despite the exclusion. This assumption would beg the question presented in the first portion of this argument.

*Where separate defendants are insured in different companies there is no double insurance.* If, as joint tortfeasors, they were to go into court and ask for a declaration of rights as to the proportion of their liabilities they would be met by the rule mistakenly relied upon by United here that there is no contribution between joint tortfeasors. A court could not declare what proportion of the loss, *for which each was wholly liable*, each should pay. As between themselves, and toward the claimants there was no *primary* and *secondary* liability here. (Argument V, post.) In this case United has asked a court to declare its rights as an insurer respecting another insurer. The Court could have declared that since each defendant in the tort case was liable for the whole loss (*subject to the ultimate liability of Gilbert*) it could not apportion the loss between them. Instead the trial court equitably ruled that each company should discharge its obligation to its assureds and that as between Page on the one hand and McKeon and Page on the other, the loss should be discharged equally [Conclusions III, IV; Tr. 65]. As discussed below no middle ground was possible and the two policies issued to separate assureds could not be prorated. *This, however, is a moot question.* The parties have already paid. If either had paid too much, as between themselves, there could not be any refund because there is no contribution between tortfeasors or their insurers. The liability of each was vicarious and traced through Gilbert. If either company had not paid enough there is nothing more to be paid since the claim is wholly satisfied. Therefore in so far as any controversy, theo-

retical only, could arise between Page and McKeon and Page, they must be left where they are, the only issue being recovery from Gilbert who caused the loss. Each has that right but, since United insures him we do not find Page's insurer asserting its right. If the argument of United at this point is intended to suggest that the Court should have ordered the insurer of McKeon and Page to share with the insurer of Page the tort liability in proportion to their respective policy limits it must fail because it erroneously assumes that the "same person" was insured in each company. If A, having an insurance policy of \$20,000 is jointly negligent with B having a policy limit of \$10,000, it would be absurd to assume that the two companies should share the loss on a 2/1 ratio. Such a conclusion would effect the contribution between joint tort feasons which the law does not sanction and which United so strongly denies. (It would be squarely against the decision in *Universal v. Catagironc*, 182 Atl. 862, relied on by United.)

The cases cited by United, evidently for the purpose of supporting a contention that this is what the Court should have done (*Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.*, 45 Cal. App. (2d) 288, and *Lamb v. Belt Casualty Co.*, 3 Cal. App. (2d) 624), are wholly beside the point for two reasons. (1) They did involve double insurance. In the *Consolidated Shippers* case, both companies issued policies to the same assured, one covering liability arising from the *ownership*, maintenance and use of a vehicle and the other covering liability arising from the operation of all automobiles *not owned* by it. In the *Lamb* case, one company issued a policy to Lamb insuring him from liability arising from the operation of a truck and another company issued a

policy insuring him for liability arising from the operation of a trailer. Negligent operation of the truck and trailer concurred to cause the loss.

In each case the same assured had a policy with two companies covering the same loss, thus resulting in double insurance. Such a result can be reached in this case only if this Court holds that the exclusions in the Ohio policy are meaningless and that Page in his individual capacity is insured as a partner in McKeon and Page despite the pointed declaration to the contrary.

(2) The two decisions are inapplicable for another reason, even if it were assumed that double insurance existed here. Each case involved policies with *pro rata* clauses. All four policies, the two in each case, provided that if the assured had other insurance covering the same risk he should not recover from the insurer a larger proportion of any loss than the coverage bore to the whole amount of applicable insurance. No such provisions existed in the present policies. Ohio's policy provided that if there was other insurance its coverage should be *excess* only [Tr. 49-50]. United's policy contained the same provision [Tr. 47]. If these clauses are effective the anomalous result would be to provide no insurance since neither would pay until the other had done so and each would decline because of the defection of the other. Clearly such clauses cancel each other. The cases relied on by United have no application here at all because, even if they involved the same assured, they contain radically different provisions and furthermore they do not involve the same assured, a fatal and absolute distinction.

*If the trial court erred in declaring the rights and liabilities of the parties hereto with respect to Page and*

*Page and McKeon* it erred on the side of equity and, each party having executed that part of the judgment, *the error is now moot* without right of refund. *The fact that United, as insurer of Gilbert, insures the person ultimately liable has nothing to do with the present controversy and has no place in its argument as insurer of Page.*

## V.

### There Is No Such Thing as Primary and Secondary Liability as Between Page and McKeon and Page.

If the argument of *United* discussed above (Section 3, p. 31, *et seq.*) is intended to indicate that the Court *did* find that a primary and secondary liability existed between Page on the one hand and McKeon and Page on the other, it is mistaken. Similarly, if the argument is intended to demonstrate that the Court should have found a primary and secondary liability, the primary being on the part of Ohio's assured McKeon and Page as employers, it is likewise mistaken.

There is no such thing as primary and secondary liability on the facts of this case (although in so far as Gilbert is concerned his liability is obviously ultimate when recoupment is sought.) The case of *Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.*, 45 Cal. App. (2d) 288, squarely holds that no primary or secondary liability *to the victim* of the tort exists. There two insurance companies insured respectively an employer and an employee (or principal and independent contractor) and the same argument was made, viz., that the primary tort liability belonged to the employee and therefore that the primary insurance coverage belonged to his insurer. It may be, although we are not certain, that *United* is

making the point that as between the two named assureds the primary tort liability rested with Ohio's assured, the operators of the truck, and that therefore the primary insurance coverage should follow accordingly, United's liability as insurer of the vehicle owner being secondary. In *Consolidated v. Pacific, supra*, the California Court rejected this argument, held to the contrary, and a petition for hearing in the Supreme Court was denied. The Court said:

"Pacific contends that Harvey was primarily liable, that plaintiff was secondarily liable and that the judgment correctly determines the respective liabilities. No California case is cited in support of this proposition and *we know of no law in this state fixing degrees of liability in relation to the joint liability for torts*. From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone (*Schilling v. Central California Traction Co.*, 115 Cal. App. 30, 1 Pac. 2d 53), or against both jointly, it would seem that there could be no such thing as primary and secondary liability. Moreover, the court made no finding on the issue of primary and secondary liability *as between Harvey and plaintiff*, and in fact made no finding concerning the relationship existing between Harvey and plaintiff out of which the latter's liability arose. In view of our conclusion that both policies insured the same risk so far as plaintiff is concerned, *the fact that plaintiff's liability may have been primary or secondary becomes immaterial*. Regardless of the nature of such liability, any loss resulting therefrom was covered by both insurers. Judgment reversed." (Emphasis added.)



As already noted the employer, having been rendered liable by his employee's negligence, may recoup from his employee (*Johnston v. City of San Fernando*, 35 Cal. App. (2d) 244, 246; *Myers v. Tranquility Irr. Dist.*, 26 Cal. App. (2d) 385, 389).

## VI.

### **"The Rider" of Ohio's Policy Relied on by United Has No Application to the Present Case.**

The argument of United that the "rider" it refers to extends Ohio's coverage is based upon an emasculated and very misleading quotation of its terms. United baldly asserts (Appellant's Brief pp. 12-13) that "by a Certificate of Insurance issued subsequent to the policy itself, Ohio stated that its coverage applied to all automobiles owned or *operated* by its assured." The emphasis is United's. Further, it says (p. 13): "The special endorsement controlled. The printed form of the original policy was relegated to the background." Based upon this highly misleading statement United argues that the trial court ignored the holding of this Court in *Tarleton v. De Vcune*, 113 F. (2d) 290, and later argues (p. 38) that the trial court thus failed to follow the law of California that a rider to a policy takes precedence over printed provisions in its main body.

A mere reference to the Certificate of Insurance referred to, as United well knows and as the trial court found, shows that it was issued to *Camp Cooke Post Exchange* and that it was clearly intended to apply only to operations of a limited character performed by the assured on behalf of that Post Exchange. The endorsement was expressly "Issued to Camp Cooke Post Ex-



change.” There is no evidence or suggestion that Gilbert was acting directly or indirectly in connection with any errand to or from Camp Cooke. The Court found that the said endorsement was “issued for the protection of the said Camp Cooke Post Exchange in connection with activities of the assureds conducted on behalf of Camp Cooke Post Exchange and that said endorsements did not otherwise affect or modify said policy and were not intended so to do” and further “that at the time of the accident in question the truck was not being operated on behalf of Camp Cooke Post Exchange.” [Finding XXI, Tr. 63.]

The full text of the Camp Cooke endorsement appears at pages 50-51 of the Transcript.

United makes no reference to Camp Cooke Post Exchange, the addressee of the endorsement upon which it relies, nor to the finding of the Court respecting it.

It is obvious that the endorsement was issued to satisfy some requirement of Camp Cooke Post Exchange. The limited significance and application of this endorsement was recognized by United when the record was made in this case. A reference to the Stipulation of Facts [Tr. 34, *et seq.*] shows that no stipulation was made concerning this endorsement (although its issuance was admitted and it was part of Ohio's policy filed as an exhibit with its answer), because clearly United did not at that time intend to make such a contention. *In the statement of United's pre-trial contentions* [Tr. 40-41] *no such contention appears*. It is suggested as an apparently desperate afterthought.

There is no question that the rule of construction is as contended by United, that a rider attached to a policy takes precedence over the printed body thereof. So far

as this particular endorsement is concerned it was the function of the trial court to draw the proper conclusion as to the intention of the parties and its finding cannot be disturbed if there is room for reasonable difference of opinion. We submit that had a different conclusion been drawn it would have been contrary to the plain intention of the endorsement and unsupported by evidence.

The only place for application of this admitted rule of construction in this case is in connection with the endorsement to Ohio's policy found at page 36 of the Transcript providing that coverage is not extended to Page as an individual or in connection with any activities not specified in the policy. The rule of construction relied on by United provides a strong additional reason for rejecting its argument on the main point. United contends that since McKeon and Page are named as assureds, Page is an assured. But the endorsement says in so many words "When we say McKeon and Page we mean McKeon and Page in connection with the activities of McKeon and Page and we do not mean Page as an individual or in connection with any activities not specified herein." This endorsement, and the rule of construction elevating it to precedence over the policy itself, United asks this Court to ignore. However, the main body of the policy confirms the rider by specifically naming the assureds.

It is respectfully submitted that in attempting to defeat the deliberate and carefully expressed intention of both the insurer and the assured upon the basis of an endorsement specifically directed to a third party United is grasping at straws. The trial court was justified in finding as it did in connection with this endorsement and, we believe, compelled to do so.

## VII.

### Insurance Code, Section 383.5, Has No Application.

By an ingenious and highly sophisticated argument United contends (pp. 16-17) that since Section 383.5 of the Insurance Code of California provides that “‘the owner’ as used in this section means any person who is named as an insured in such contract of insurance,” Page, being named in McKeon and Page, is the owner of the vehicle in question. At the outset it should be observed that there is nothing in the section in question which would alter the situation even if we were to translate the name of every person mentioned in the policy into “owner.” However, we believe the argument reduces itself to an absurdity for other reasons.

The statute has been Shephardized and no cases interpreting it have been found. The statute provides that a person “*who is named as an insured*” is to be regarded as an owner. It does not provide that persons who are excluded must be regarded as owners. Therefore, when a policy insures “Richard Roe and all members of his household except his son John Roe” (a frequent policy provision to exclude irresponsible drivers) it is obvious that John Roe, not being named as an insured, is not to be considered as an owner. By a parity of reasoning, when a policy names as assureds “McKeon and Page dba Pacific Laundry & Dry Cleaners, *but not Page in any other capacity*,” it is very clear that “Page in any other capacity” is not named in the policy as an assured, but is named as a person who is excluded.

Again, in order to accept United’s argument it will be necessary for this Court to disregard the decisions in the

*National Automobile* cases and to delete from the contract between Ohio and McKeon and Page the very clear and lawful exclusions it contains.

### VIII.

#### **The Court Followed the Rule of *Erie Railroad Company v. Tompkins*, 304 U. S. 64.**

United asserts that in various respects the trial court failed to apply the law of California and that it thus disregarded the rule of *Erie Railroad Company v. Tompkins*, 304 U. S. 64.

“The most grievous error of the trial court” is alleged to have been “in disregarding the California rule which has been followed by this Court that a rider attached to a policy takes precedence over the language contained in the body of the contract.” (P. 38.) On this basis United complains that the trial court interpreted Ohio’s policy to mean what it says and to deny that it insured the risks which were excluded (pp. 38-39). On the contrary as has been seen the rider relied upon by United is so obviously inapplicable that it cannot be quoted in full in its brief without self-refutation. The rule of construction, however, does apply elsewhere in this case and was applied by the trial court in giving effect to the rider interpreting “McKeon and Page” and expressly excluding risks insured by United.

Next, in this connection, it is argued that the trial court “failed to follow the correct rule with regard to

partnerships in California” (p. 39). The fact is that the trial court squarely followed the law of California as established in the *National Automobile* cases. So far as we are aware the decision of the trial court is not in conflict with any decision in any jurisdiction.

Next, it is claimed that the trial court failed to give effect to Section 383.5 of the Insurance Code of California. As has been noted, to interpret that statute so as to treat one excluded from coverage as a “person who is named as an insured” would be an absurdity and in refusing to accept such an argument the trial court did the inevitable.

Lastly, it is contended that the trial court failed to follow the law of California respecting double insurance as laid down in *Consolidated Shippers v. Pacific Employers Insurance Co.*, *supra*, and *Lamb v. Belt Casualty Co.*, *supra*. As has been noted these cases have nothing to do with the present problem. They involved policies issued by different companies to the same assured, not policies issued to different assureds. Furthermore, this case involves no problem of prorating insurance but the question of who carries the insurance on the ultimately liable, single tort feisor.

It is conceded that the contracts are to be governed by the law of California as held by this Court in *Gates v. General Casualty Company of America*, 120 F. (2d) 925. It is respectfully submitted that the trial court on every point followed the law of this state which, so far as we are aware, represents the law universally.



### Conclusion.

It is respectfully submitted that United's argument is based upon a confused misconception of the facts and of its own dual capacity herein. It appears in this Court in a dual capacity, as insurer of G. B. Page, an individual, and as insurer of Floyd Gilbert, *who caused the accident*, and who carries the ultimate liability to those who suffered loss through him. As insurer of Page United has no conceivable objection. If it is dissatisfied with having paid one-half the claim of the claimants as insurer for *Page* its objection is unfounded since its liability was total (as was that of McKeon and Page) and furthermore it has rendered the question moot by discharging one-half of the claim.

In its capacity as insurer of Gilbert, United also has no cause of complaint. It admits that it insured Gilbert and that Gilbert culpably caused the loss. Gilbert is therefore liable to Page and to McKeon and Page to reimburse their losses. If some other insurer than United insured Gilbert, United would undoubtedly press its right of subrogation as Ohio is now doing. But because of the confusion on the part of United as to its dual position, *it attempts to stand in the character of insurer of Page and complain of the liability imposed upon it as the insurer of Gilbert.*

There is no doubt that the insurer of an employer who has reasonably and necessarily discharged a liability created by the negligence of its employee has a right to recoup from the employee or his insurer (*Johnston v. City of San Fernando, supra; Myers v. Tranquility Irr. Dist., supra*).



The other arguments made by United, that the Court ignored the law of California in various respects and ordered contribution between joint tort feors are bewilderingly foreign to the issues of this case.

Under these circumstances a judgment against Gilbert should not be and is not necessary as a condition precedent to the establishment of United's liability (*L. J. Dowell, Inc. v. United Pacific Casualty Co., supra*). United was the defendant in the foregoing decision. A judgment against Gilbert would establish only two things: Gilbert's liability and the extent of the liability. *United has stipulated to both elements*. It admits that Gilbert was to blame for the accident and it fixed a reasonable price by making a settlement. While United apparently claims the right to defend an action against Gilbert, thus having a chance to disprove the very things it has admitted, such procedure would, we respectfully submit, be unconscionable and would involve a waste of money and effort on the part of all concerned.

Beyond all this, United has invoked the aid of the District Court of the United States to declare its rights and obligations and expressly asked the Court to declare its obligations as to Gilbert. The trial court answered this prayer and decreed that United is obligated, within the limits of its policy, to reimburse Ohio for all expenditures, reasonably and necessarily made by it in satisfaction of the claim. This was the sum of \$5125 (Appellant's Brief 8). It should not now be permitted to repudiate the judgment of the trial court and to require Ohio to prove in a Nebraska Court those things which United has admitted in the Court below.

It is respectfully submitted that the trial court has rendered the only possible judgment on the facts of this case and it is prayed that the judgment be affirmed.

Respectfully submitted,

HARRY D. PARKER,

RICHARD E. REESE,

RAYMOND G. STANBURY,

*Attorneys for Appellee, the Ohio Casualty Insurance  
Company.*

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant.

vs.

MINA BICKFORD,  
Appellee.

---

Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Montana

FILED

FEB - 4 1948

PAUL P. O'BRIEN, CLERK









No.11801

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant.

vs.

MINA BICKFORD,  
Appellee.

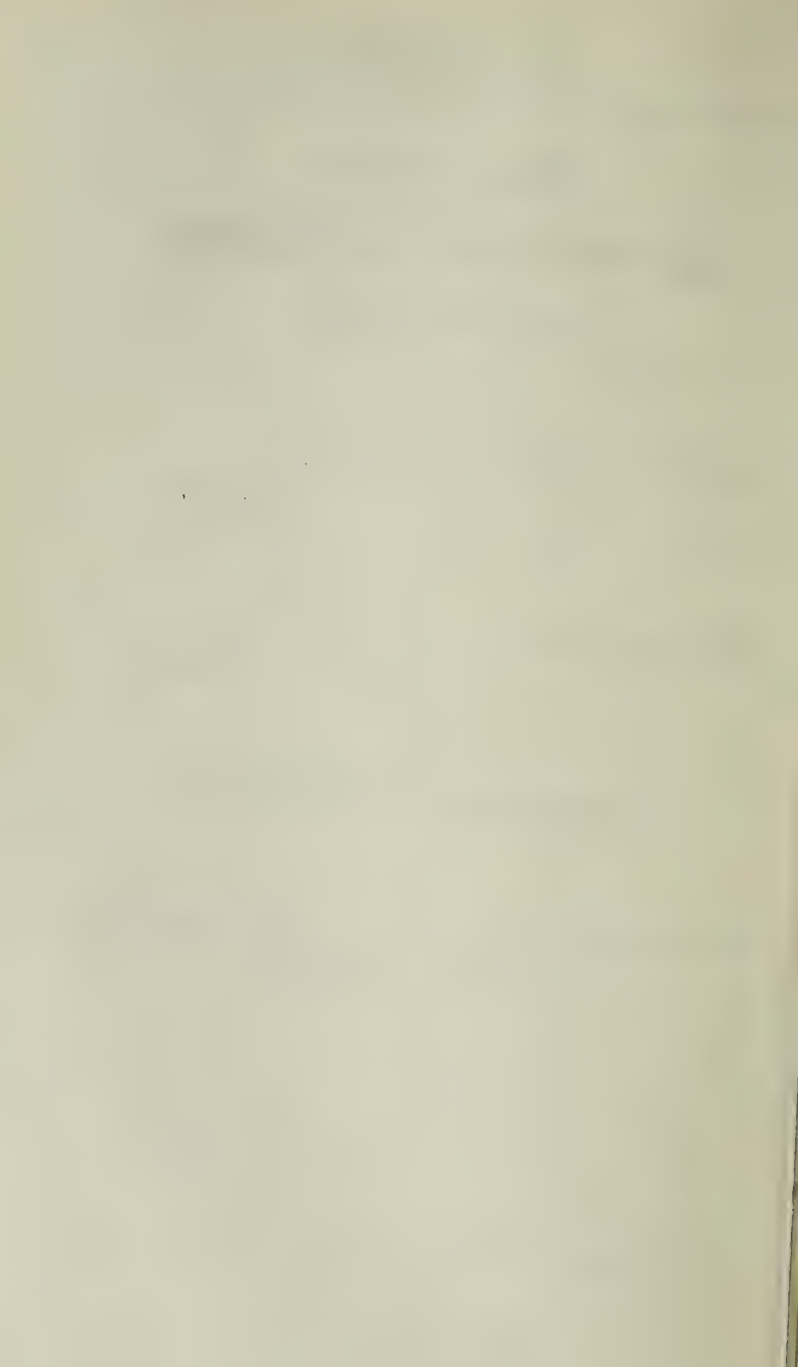
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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

JOHN B. TANSIL,

Attorney of the United States in and for the  
District of Montana,  
Billings, Montana,

HARLOW PEASE,

Assistant Attorney of the United States in and  
for the District of Montana,  
Butte, Montana,

EMMETT C. ANGLAND,

Assistant Attorney of the United States in and  
for the District of Montana,  
Butte, Montana,

Attorneys for Appellant.

HARRISON J. FREEBOURN,

Butte, Montana,

Attorney for Appellee. [1\*]

In the District Court of the United States, District  
of Montana, Butte Division

No. 3563

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MINA BICKFORD,

Defendant.

[Title of District Court and Cause.]

INDICTMENT

(18 U.S.C. 231)

The Grand Jury Charges:

The defendant Mina Bickford, on or about October 22, 1945, at Butte, in the District of Montana and within the jurisdiction of this court, in the District Court of the United States for the District of Montana then and there engaged in the trial of a criminal cause entitled "United States of America vs. Charles Howard Downey" wherein said Downey was charged with the crime of violation of the White Slave Traffic Act, after having taken an oath as a witness before the said District Court which was administered by the Clerk of said Court that she would testify truly, did wilfully, corruptly, falsely and feloniously and contrary to said oath testify to certain matters which were material to the issues of the cause then on trial, to-wit:

Said defendant testified that a certain house situated at No. 14 South Whoming Street, in the City



of Butte, Montana, was in the month of December, 1944, a rooming house; that in said house no other business except that of a rooming house was carried on in the month of December, 1944; that the said house was not in the month of December, 1944, a house of prostitution; that said house was not a house of prostitution at the time defendant was testifying, and never was such; that she, said defendant, did not see the said Charles Howard Downey and one Pauling Gleason Young at any time in the month of December, [3] 1944; that she, said defendant, did not state to one Vincent Garvey, a Special Agent of the Federal Bureau of Investigation, in June, 1945, that she recognized said Pauline Gleason Young as the girl who came to Butte from Seattle and that as a fact she, said defendant, had not in June, 1945, recognized said Pauline Gleason Young as a girl brought to said house at 14 South Wyoming Street, Butte, Montana, by said Charles Howard Downey for the purpose of going to work as a prostitute. Said testimony was false and known by said defendant to be false, and said defendant did not believe the same to be true. In truth and in fact the said house at 14 South Wyoming Street, Butte, Montana, was a house of prostitution in the month of December, 1944, and for years prior thereto, and was such thereafter up to and at the time the defendant was testifying, and was well known by the defendant to be such; the said defendant did see the said Charles Howard Downey and the said Pauline Gleason Young in the

month of December, 1944, at which time said Downey proposed to introduce said Pauline Gleason Young into said house of prostitution for the purpose of engaging in prostitution; that she, said defendant, did state to Vincent Garvey, above mentioned, in June, 1945, that she recognized said Pauline Gleason as the girl who came to Butte from Seattle, and as the girl who was brought to said house at 14 South Wyoming Street, Butte, Montana, by said Downey for the purpose of going to work as a prostitute. Said matters were material to the issues then being tried in said cause in that the said Charles Howard Downey was charged by indictment in said court with having unlawfully transported said Pauline Gleason Young in interstate commerce for the purpose of prostitution on or about the 5th day of December, 1944.

A true bill:

T. LOYE ASHTON,  
Foreman.

JOHN B. TANSIL,  
United States Attorney.

Filed in open Court this 18th day of February,  
A.D. 1947.

/s/ H. H. WALKER,  
Clerk. [4]

[Title of District Court and Cause.]

Minute Entry, November 3, 1947

**MOTION OF DEFENDANT TO DISMISS  
THE INDICTMENT HEREIN**

This cause was duly called for trial this day, Messrs. Harlow Pease and Emmett C. Anglund, Assistant United States Attorneys, being present and appearing for plaintiff, and Mr. H. J. Freebourn and the defendant being present.

Thereupon, Mr. Freebourn, attorney for defendant, moved to dismiss the indictment herein for the reason the indictment does not state a public offense, and after statement by Mr. Freebourn and Mr. Pease, the said motion was submitted to the Court, and after due consideration was by the Court granted, the indictment is ordered dismissed and defendant's bond ordered exonerated. Counsel for plaintiff excepted to ruling of Court.

Entered in open Court at Butte, Montana, November 3, 1947.

H. H. WALKER,  
Clerk. [5]

[Title of District Court and Cause.]

## TRANSCRIPT OF PROCEEDINGS

Be It Remembered, that this cause came on regularly for trial before the Honorable R. Lewis Brown, Judge of the District Court of the United States, District of Montana, Butte Division, on the 3rd day of November, 1947, Messrs. Harlow Pease and Emmett C. Angland, Assistant United States Attorneys for the District of Montana, appearing as attorneys for the plaintiff, and Mr. Harrison J. Freebourn, Butte, Montana, appearing as attorney for the defendant.

Thereupon, the following proceedings were had:

The Court: Number 3563, United States vs. Mina Bickford. Are the parties ready?

Mr. Pease: The government is ready.

Mr. Freebourn: The defendant is ready.

The Court: Hand me the file, will you please? Well, as you know, gentlemen, last week in doing some work on this case [7] preparatory to trial, I had a doubt as to whether or not the case could be tried because of the allegations, or as I view them, the lack of allegations, in the indictment. I called that to the attention of both you counsel, and what have you to say? Do you think the indictment states a public offense?

Mr. Freebourn: I was going to interpose a motion when the evidence was started, and it may save drawing a jury, I don't know, depending upon how the Court looks at it. I was going to interpose an objection to the introduction of evidence and a

motion that the indictment be dismissed upon the ground and for the reason that the indictment does not state a public offense. I am certain under the statute it is absolutely necessary that the officer who administered the oath had that authority; it is too plain to me to be otherwise. In the cases cited, they did allege that, but this indictment does not allege that at all.

Mr. Pease: If the Court please, I would like to have particular thought given to the language of the statute, 558, upon which the language—under the language of which the attack is made upon the indictment. It is the theory that it was, and is, an essential part of the indictment that it should set forth not merely the facts, stating that the oath was administered before the United States District Court, not only stating that it was administered in a trial and proceeding in the United States District Court, not only that it was administered [8] by the Clerk of said Court, all of which are alleged in the indictment, but in addition to alleging the facts that this was the Court and this was the Clerk, that the Clerk did have authority to administer the oath, which is, of course, by statute a necessary conclusion falling from the statement of such facts. Now, that is based upon the statute, reading Section 558 of Title 18, “In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to ad-



minister the same." Now, it seems to me, your Honor, that the criticism of the indictment is based upon an assumption that the statute reads "averring such court and person to have competent authority to administer the same." It seems to me that that would be the assumption, because otherwise the theory would not have apparent validity, not averring such court or person to have competent authority to administer the same. Now, we may deal, and the courts have dealt, with a variety of courts and a variety of officers in perjury cases. A United States Commissioner has a Commissioner's Court, which is of inferior and limited jurisdiction, and yet perjury may be committed in a Commissioner's Court, and a false swearing, perhaps, may happen in a Commissioner's Court which would not amount to perjury for the reason that it would be committed in [9] a proceeding of which the Commissioner did not have jurisdiction, or in a proceeding which, by reason of some irregularity, the requisite authority did not exist. Now, I point this out, your Honor, that if it is necessary for the indictment not only to allege that the oath was administered by the Clerk of the United States District Court, but also the conclusion that such Clerk had such authority, then it is also necessary for us to plead that the oath was administered in the United States District Court, and that this Court had authority to try the case of United States vs. Charles Howard Downey for violation of the White Slave Traffic Act. On the other hand, taking the statute as it reads, with special emphasis upon the



disjunctive, or instead of the possibly assumed conjunctive, is it not a compliance with Section 558 that the facts are fully stated showing that this Court was engaged in a trial of a violation of a federal statute in which a federal question was involved, and of which the Court had jurisdiction? In other words, doesn't this mean that if the facts stated in the indictment show either that the Court or officer had authority in the premises, is that not a compliance with Section 558? That is the way it appears to me.

It further may be suggested herein I believe no case can be found holding bad an indictment for perjury where the alleged perjury is said to have been committed before the United States District Court, and the oath administered by the [10] Clerk of said Court, for failure to say that the Clerk under such circumstances, and under the facts alleged in this indictment, had authority to administer the oath. Authorities do exist where the courts have overruled attacks upon indictments in circumstances where, through an abundance of caution, or otherwise, there was an allegation which the defendant claimed was defective, and the court said was sufficient. There have been reversals of one or more in cases involving inferior tribunals not of plenary jurisdiction such as the United States District Court. I say plenary and not general because I believe that when the federal question arises, like the trial of a White Slave Traffic Act case, as existed here, once that is established, this Court has plenary jurisdiction. So, I say I believe there is one case sustaining an attack upon an indictment

where the oath was administered before an inferior court. That case was also reversed on two other grounds, thereby weakening the case to such extent, or the authority of it.

The Court: What do you say about the decision of the Circuit Court of Appeals of the Fifth Circuit in 24 Federal 2nd?

Mr. Pease: The title of the case, your Honor?

The Court: Hilliard against United States. How do you answer the reasoning of the Circuit Court of Appeals there?

Mr. Pease: If it is the case which I have in mind, I believe the Court goes beyond the necessary conclusion to be made. [11]

The Court: The Circuit Court of Appeals there says it is an essential allegation.

Mr. Pease: I answer that, of course, by saying that no conclusion, especially under the present rules of criminal pleading, no conclusion is an essential allegation; that all that needs be alleged are facts, and we have alleged all the facts, every fact it is possible to allege. We haven't gone beyond that to allege the legal conclusion which the Court must take judicial notice of, namely, that the Clerk has authority to administer oaths in the trials before this Court.

The Court: The Circuit Court of Appeals didn't say that was a legal conclusion there.

Mr. Pease: The case, I believe was decided—that may or may not be of importance—before the enactment of the new rules, but they simply didn't discuss the question, as I remember the language of the decision.

The Court: They discussed it to the extent they said it was an essential allegation.

Mr. Pease: They didn't discuss any distinction between allegations of facts and allegations of a legal conclusion, so I don't think that my position is any worse on that case than that of the defendant. The particular point which I am presenting here doesn't seem to have been specifically answered by the opinion in that case.

The Court: That may be true. Your point is it's conjunctive [12] instead of disjunctive. But there is no allegation in the indictment that either the Court or the officer had authority to administer the oath.

Mr. Pease: That is right, and if that is taken to mean the indictment is bad unless it alleges the legal conclusion which flows from the facts which the indictment does contain, I have nothing further to say.

The Court: If by Act of Congress—if Congress says it is necessary to plead a legal conclusion, is the pleading good without pleading the legal conclusion that Congress says must be pleaded?

Mr. Pease: I don't know whether this is a correct statement, but it seems to me we are in a vicious circle. I am assuming Congress has never enacted that it is necessary to plead anything except facts, not evidentiary facts, but ultimate facts, and I just can't see there is. It must be admitted that there is no reason why there should be an exception to the general rule, either in a criminal or civil pleading, that that which is a matter of judicial notice

by the Court, such as laws, constitutions and so forth, need not be pleaded. I don't know why it should have been different in this case, and if it be said Congress so enacted, that is merely a matter of interpretation. On the face of it, it may so appear, but in the absence of any reason, why should it not be interpreted to mean by alleging facts from which such authority is [13] necessarily concluded. That is my position as nearly as I can express it, your Honor.

The Court: Well, the statute, Section 558 of Title 18, provides that in any presentment or indictment prosecuted against any person for perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court and before whom the oath was taken, averring—which is synonymous as I view it with alleging—such court or person to have competent authority to administer the same. There is no such averment or allegation in this indictment. The matter was before our Circuit Court of Appeals in *Barnard against United States*, 162 Federal at 618. The allegation in the indictment there was that the officer administering the oath had authority to administer an—A-N—oath. Appeal was taken to the Circuit Court of Appeals on the ground that that was not sufficient compliance with the statute, and the Court held that it was. It was before our Circuit Court of Appeals again in *United States against Pawley*, 47 Federal Second at 1024. The Supreme Court there held the necessary averment or allegation was in the indictment, or rather the

Circuit Court of Appeals. In neither one of those cases did the Circuit Court of Appeals intimate that such averment or such allegation was not a necessary allegation or necessary averment in the indictment. They charged the offense in Hilliard against U. S., 24 Federal [14] Second, 99. The Circuit Court of Appeals for the Fifth Circuit said, "In charging perjury, it is sufficient, but it is also necessary, to set forth the substance of the offense and to show before whom the oath was taken, with the averment that the officer taking it had authority to administer it, together with the proper averment to falsity the matter whereon the perjury is assigned." It seems to me that if there were any question about the language, the Circuit Court of Appeals of the Fifth Circuit settles it, and in view of the fact that the question, as I have said, has been before our Circuit Court of Appeals twice, and in no decision before them have they intimated that the statute did not mean what it said, or that an indictment was good that failed to include the necessary averment. The only cases I have found in which an indictment has been sustained in anywise touching the question without having such an averment in it are cases in which one was charged with subornation of perjury, and, of course, reading Section 559, Title 18 in connection with Section 558, 559 setting forth the essentials necessary to state a public offense for subornation of perjury, it is apparent why such decision would be made, because there is no such provision at all in Section 559 and no requirement that such averment be made in the



indictment. That being the law, as I view it, and no authority to the contrary having been cited to me, it seems to me that the indictment does not state a public [15] offense, and that I have no alternative except to dismiss the action for that reason and exonerate the defendant's bail.

Mr. Pease: May the record show an exception, your Honor?

The Court: The government will be granted an exception to the ruling of the Court. [16]

I, John J. Parker, Official Court Reporter in the District Court of the United States, District of Montana, Butte Division, do hereby certify that the foregoing annexed transcript is a true and correct record of the proceedings had in Criminal Action No. 3563, United States of America, Plaintiff, vs. Mina Bickford, Defendant, before the Honorable R. Lewis Brown in the Federal Building at Butte, Montana, on November 3, 1947.

/s/ JOHN J. PARKER,  
Official Court Reporter.

[Endorsed]: Filed Nov. 28, 1947. H. H. Walker,  
Clerk. [17]



[Title of District Court and Cause.]

### NOTICE OF APPEAL

Offense: Perjury, alleged to have been committed October 22, 1945, at Butte, Montana, in the United States District Court for the District of Montana, Butte Division, by the defendant then sworn and testifying as a witness in the cause of United States v. Charles Howard Downey on an indictment for violation of the White Slave Traffic Act; in violation of Title 18 United States Code, Sec. 231. Indictment contains one count.

Concise statement of judgment or order: That certain order and judgment made on November 3, 1947, granting defendant's motion to dismiss, and ordering dismissed, the indictment in this cause.

The above-named appellant, United States of America, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-mentioned order and judgment.

Dated November 26, 1947.

JOHN B. TANSIL,

U. S. District Attorney for  
Montana.

HARLOW PEASE,

Assistant United States  
Attorney,

EMMETT C. ANGLAND,

Assistant United States  
Attorney,

Attorneys for Appellant.

[Endorsed]: Filed Nov. 26, 1947. H. H. Walker,  
Clerk. [19]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

The plaintiff hereby designates the portions of the record in the United States District Court to be contained in the record on appeal as follows:

The indictment.

The minutes of said Court of date November 3, 1947.

The transcript of the proceedings had by the Court and counsel on November 3, 1947.

The judgment of the Court appealed from.

The notice of appeal.

This designation.

Appellant's statement of points on appeal.

JOHN B. TANSIL,

U. S. District Attorney for  
Montana.

HARLOW PEASE,

Assistant United States  
Attorney,

EMMETT C. ANGLAND,

Assistant United States  
Attorney,

Attorneys for Appellant.

Service of the foregoing is hereby admitted this 28th day of November, 1947.

HARRISON J. FREEBOURN,

Attorney for Defendant and  
Respondent.

[Endorsed]: Filed Dec. 1, 1947. H. H. Walker,  
Clerk. [21]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The Court erred in granting defendant's motion to dismiss the indictment.

JOHN B. TANSIL,  
U. S. District Attorney for  
Montana,

HARLOW PEASE,  
Assistant United States  
Attorney,

EMMETT C. ANGLAND,  
Assistant United States  
Attorney,

Attorneys for Appellant.

Service of the foregoing is hereby admitted this  
28th day of November, 1947.

HARRISON J. FREEBOURN,  
Attorney for Defendant and  
Respondent.

[Endorsed]: Filed Dec. 1, 1947. H. H. Walker,  
Clerk. [23]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD ON APPEAL

United States of America,  
District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 24 pages, numbered consecutively from 1 to 24, inclusive, is a full, true and correct transcript of all matter designated by the parties and required by rule as the Record on Appeal in Case No. 3563, United States of America, Plaintiff, vs. Mina Bickford, Defendant, as appears from the original records and files of said District Court in my custody as such Clerk.

I further certify that the costs of said Transcript amount to the sum of Five and 20/100 Dollars (\$5.20), and have been made a charge against the appellant.

Witness my hand and the seal of said District Court at Butte, Montana, this 16th day of December, A.D. 1947.

[Seal] H. H. WALKER, Clerk.

By /s/ D. F. HOLLAND,  
Deputy Clerk. [24]

[Endorsed]: No. 11801. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant. vs. Mina Bickford, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed December 19, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.





United States  
Circuit Court of Appeals  
For the Ninth Circuit

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UNITED STATES OF AMERICA,

Appellant,

vs.

MINA BICKFORD,

Appellee.

---

Upon Appeal from the District Court of the United States  
for the District of Montana.

---

BRIEF OF APPELLANT

---

JOHN B. TANSIL,  
United States Attorney,  
Billings, Montana;

HARLOW PEASE,  
Assistant U. S. Attorney,  
Butte, Montana;

EMMETT C. ANGLAND,  
Assistant U. S. Attorney,  
Butte, Montana,  
Attorneys for Appellant.



United States  
**Circuit Court of Appeals**  
For the Ninth Circuit

---

UNITED STATES OF AMERICA,

Appellant,

vs.

MINA BICKFORD,

Appellee.

---

Upon Appeal from the District Court of the United States  
for the District of Montana.

---

BRIEF OF APPELLANT

---

JOHN B. TANSIL,  
United States Attorney,  
Billings, Montana;

HARLOW PEASE,  
Assistant U. S. Attorney,  
Butte, Montana;

EMMETT C. ANGLAND,  
Assistant U. S. Attorney,  
Butte, Montana,  
Attorneys for Appellant.

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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UNITED STATES OF AMERICA,

Appellant,

vs.

MINA BICKFORD,

Appellee.

---

BRIEF OF APPELLANT

---

JURISDICTIONAL STATEMENT

The District Court had jurisdiction by virtue of the charge in the indictment invoking the application of sec. 231, Title 18 U. S. Code, defining perjury as a crime against the sovereignty of the United States, (R. 2). Pursuant to sec. 41, Title 28 U. S. Code, the District Court has original jurisdiction of prosecutions for crimes against the United States.

The Circuit Court of Appeals has acquired jurisdiction by notice of appeal and other papers pursuant to the Rules of Procedure, timely filed (R. 15). The order appealed from is one "dismissing the action" and is therefore a "decision or judgment quashing . . . an indictment" and is appealable by the provision of sec. 682, Title 28 U. S. Code, and sec. 225, Title 28 U. S. Code.

## STATEMENT OF FACTS

This appeal involves a single point, viz., whether the indictment for perjury (Title 18 U. S. C. sec. 231) in this case fails to state a public offense, as the District Court ruled.

The particular point upon which the Court ruled the indictment lacking was founded upon sec. 558 of Title 18 U. S. C., in that the indictment did not comply with the following clause of sec. 558:

“Averring such court or person to have competent authority to administer the same.” (The oath taken by the defendant.)

The allegations of the indictment pertinent to the question are contained in the first twelve lines thereof, appearing on page 2 of the transcript of record, reading as follows:

“The defendant, Mina Bickford, on or about October 22, 1945, at Butte, in the District of Montana and within the jurisdiction of this court, in the District Court of the United States for the District of Montana, then and there engaged in the trial of a criminal cause entitled ‘United States of America vs. Charles Howard Downey’ wherein said Downey was charged with the crime of violation of the White Slave Traffic Act, after having taken an oath as a witness before the said District Court which was administered by the Clerk of said Court that she would testify truly,  
\* \* \* ”

Conceding that the indictment does not allege verbatim in addition to the foregoing that said clerk “had authority to administer said oath,” the government contends:

(a) That the indictment does comply with sec. 558; and

(b) That if it be held not to comply with sec. 558, it is still sufficient under Rule 7(c) of the Rules of Criminal Procedure in that sec. 558 has been amended or its effect modified by the enactment of the new criminal rules;

(c) That sec. 556 of Title 18, U. S. C. should be given effect in the solution of this question.

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### SPECIFICATION OF ERROR

1. The District Court erred in making its order dismissing the indictment (R. 14).

---

### SUMMARY OF ARGUMENT

The argument consists of only two parts, (A) contending that the indictment sufficiently stated a public offense under the law existing prior to the promulgation of the Rules of Criminal Procedure, and (B) contending that the present Rules of Criminal Procedure have the effect to repeal all statutes prescribing forms of criminal pleading which may be inconsistent therewith, hence the indictment is good regardless of this Court's determination on part (A).

## ARGUMENT

### *A. The Necessary Averment is Contained*

Under existing statutes, sections 231, 558 and 556, Title 18, U. S. C. and without reference to the new Rules of Criminal Procedure, it is submitted that the indictment is sufficient. The basic requirements of a good indictment are: first, to state *facts* sufficient to inform the defendant of what offense he is charged, and second, to do this with sufficient certainty to prevent another prosecution for the same act.

*Berger v. United States*, 295 U. S. 78;

*Hagner v. United States*, 285 U. S. 427 and cases cited therein;

*Hopper v. United States*, 142 F. 2d 181 (9 Cir. 1943) and cases cited.

42 C. J. S., Indictments and Informations, sec. 90 a, page 957 and sec. 90 c, page 963, et seq.

The general rule obtains that conclusions as distinguished from facts need not be averred.

42 C. J. S., Indictments and Information, sec. 114.

The further rule obtains that matters of which the Court must or will take judicial notice need not be stated.

42 C. J. S., Indictments and Informations, sec. 113.

The following facts are contained in the pertinent portion of the indictment under discussion:

1. That the United States District Court was engaged in the trial of a criminal cause, wherein a person was charged with violation of the White Slave Traffic Act.

2. That the defendant Bickford took an oath as a witness before said court in said trial.

3. That said oath was administered by the Clerk of said Court.

From the three facts just quoted, the legal conclusion that the Clerk had authority to administer the oath which the witness took, is inescapable; further such conclusion must, as a matter of judicial knowledge, be adopted by the Court because, of course, the Court takes judicial notice that its own clerk, in the course of a trial of a cause in which the court has jurisdiction of the subject matter, does possess the requisite authority. Title 28 U. S. C. sec. 525. For the pleader to have gone further and parroted the language of sec. 558 would have added nothing to the effect of the facts thus averred.

Further illustrating our contention, if the indictment had not stated that defendant Bickford was a witness in said court, or if it had not stated that the court was in session, or had not stated that the court was engaged in a trial, or had not stated that the trial in which the court was engaged, was one of which it had jurisdiction, undoubtedly the indictment would have been lacking in the allegation of *facts* showing that the clerk possessed the authority to administer the oath. But the indictment did state all the facts which have been here enumerated. It could not have stated any more facts with reference to the basis for administering the oath and the officer who administered it, which would be in anywise pertinent.

The case of *Barnard v. United States*, 162 Fed. 618, 623-624 (9 Cir. 1908), although relied upon by the District Court in its ruling (R. 12), oddly enough appears to give greater support to the government's position than it does to the order appealed from.

The prosecution was for perjury alleged to have been committed before a United States Commissioner. The indictment did not allege that the Commissioner had authority to administer *the* oath which the defendant took, but alleged that he had authority to administer *an* oath. The Court held the indictment sufficient over the objection that it did not state the Commissioner had authority to administer *said* oath, "that is to say, the oath that was required to be taken *in that case at that time*." In our opinion the effect of the Court's reasoning is to concede that the allegation of "*an* oath" instead of "*the* oath," if standing alone, would be insufficient. The opinion emphasizes, however, that the indictment proceeded to state certain *facts* as to the time, place and occasion of the taking of the oath, which furnished a factual basis for the taking of *judicial notice by the Court* that the Commissioner was duly authorized to administer it. In other words, the indictment in that case was like the indictment in this appeal in that it set forth the official proceeding in which the Commissioner was engaged and the participation of the accused therein and by reason of such allegations of fact, involved judicial notice and supplied the requirement of section 558. We now quote the entire paragraph from the Barnard case:

"In our opinion the indictment is not open to the objection urged against it. It is not only alleged that the commissioner was an officer who was authorized by the laws of the United States to administer an oath and take testimony of witnesses in the matter of the application of a claimant to make final proof upon a homestead entry, *but it is alleged that the commissioner 'was then and there engaged in taking and*



*hearing testimony in the matter of the application of Charles A. Watson, late of said district of Oregon, to make final proof in support of his homestead entry', and the particulars relating to the land, its location, and Watson's homestead filing upon the land and the making of final proof in this particular case are set out in the indictment, from which it appears that the proceeding had reached that stage when the claimant was entitled to make final proof, and it is alleged, 'that it then and there became and was, material that the said James S. Stewart, as such United States Commissioner for the district of Oregon and the register and receiver of the United States Land Office at The Dalles in said district of Oregon, should know and be informed from and by the said testimony whether the said Charles A. Watson had settled and resided upon and improved or cultivated the said lands so described, as required by the homestead laws of the United States', etc., and that the defendant made oath before the commissioner 'of and concerning the truth of the matter contained in said testimony so subscribed by him', and so, being sworn, 'then and there, to prevent the said James S. Stewart, United States Commissioner for the district of Oregon, and the said register and receiver of the United States Land Office at The Dalles, in said district of Oregon, from knowing the true facts and circumstances pertaining to the settlement and residences of the said Charles A. Watson upon, and his cultivation and improvement of the said lands \* \* \* willfully, corruptly, and falsely, and contrary to his said oath did depose and swear as in said testimony set forth, of and concerning the material facts aforesaid, and did state and subscribe material matters which he did not then believe to be true'. And it further alleged that the defendant, in and by his said testimony and upon his oath aforesaid, in a case in which the law of the United States authorized an oath to be administered, did unlawfully and willfully, and contrary to said*

oath, state material matters which he did not believe to be true. From these allegations setting forth the general authority of the commissioner to administer an oath and take testimony in this class of cases *and the statement of the proceedings before the commissioner in which he was engaged in taking and hearing testimony the court will take judicial notice that the commissioner had competent authority to administer the oath to the defendant in this particular proceeding and in this particular case.*" (Emphasis ours.)

The *Barnard* case was decided by this Circuit in 1908, long before the enactment of the Rules of Criminal Procedure. It is further submitted that the decision is stronger from the fact that the officer was administrative and not judicial, being a United States Commissioner of limited and inferior jurisdiction as contrasted with the Clerk of the District Court itself in which the indictment under discussion was filed.

*Hilliard v. United States*, 24 F. 2d 99 (5 Cir. 1928), is another case relied on by the Court in making the ruling appealed from. (R. 13.) Therein the Circuit Court of the Fifth District recited substantially in the statutory language the substance of sec. 558 Title 18, U. S. C., but in an examination of the last paragraph of the opinion appearing on page 100 of the Reporter, we find the following:

"The allegations of the indictment *are sufficient, perhaps, to show that an oath was taken before the clerk by the defendant, as a witness in the District Court, and that some of the testimony given by him was material; but the indictment falls short of showing wherein the testimony alleged to have been given is false, and it is insufficient to charge an offense. The demurrer was improperly overruled. For that error*

the judgment must be reversed. It is necessary to consider the other errors assigned. Reversed." (Emphasis ours.)

It is obvious that the Court passed over the asserted failure of the indictment to allege the officer's authority to administer the oath and reversed the conviction squarely upon the insufficiency of allegations charging the testimony to have been false. Indeed, it may fairly be said that the Court concedes the sufficiency of the indictment in respect of its compliance with sec. 558 and leaves it at most an open question whether it would have reversed except for the defect which is emphasized last in the above quotation.

The only other case expressly relied on by the District Court is *Pawley v. United States*, 47 F. 2d. 1024—another decision by this Ninth Circuit Court of Appeals (1931). The indictment was held good as complying with sec. 558 of Title 18. The opinion is quite consistent with the contention here being made in that the officer in question, viz., a Referee in Bankruptcy, not only was alleged to have had "competent authority to administer the oath," but the indictment also set forth that:

"There came on to be heard in the District Court before the Honorable R. W. Smith, referee in bankruptcy of the court aforesaid, at Yuma, Arizona, the first meeting of creditors at a bankruptcy proceeding; that the appellant appeared as a witness and was then and there duly sworn and took his oath as such witness, before the referee, that the testimony which he would give at the hearing, would be the truth, the whole truth and nothing but the truth; \* \* \* "

It thus appeared that the indictment in that cause, like that in the Bickford case, stated specific facts as to what the referee in bankruptcy was doing at the time pertinent; viz., that he was presiding at a meeting of creditors in a bankruptcy proceeding. The opinion of the Court, though making no reference to the judicial knowledge of the Court of the provisions of the Bankruptcy Act in express words, did point out the provisions of sections 34 and 38 of the Bankruptcy Act, showing the power of administering oaths to witnesses and thus impliedly supported the sufficiency of the indictment under the doctrine of judicial notice. It is true that the Court stated that the conclusionary allegation that the Referee then and there had competent authority to administer the oath "of itself was sufficient," but the Court did not hold or indicate that the omission of such conclusionary allegation would have vitiated the indictment.

*Hill v. United States*, 54 F. 2d 599, 602 (10 Cir. 1931), is another case expected to be relied upon by Appellee. This decision held an indictment bad for not alleging that a Notary Public had authority to administer the oath involved. The Court says:

"This averment seems to be a necessary one under the statute, which abbreviates the common law form of indictment for perjury and sets forth the *substance* of what it shall contain. U. S. Code Title 18, section 558." (Emphasis ours.)

The foregoing is the entire content of the opinion on the point and there is no further discussion of it. The case was reversed chiefly on points 1, 2 and 3 of syllabus, which were: (1) that there was a failure to prove the affidavit was ever presented to the Veterans Bureau; and

(2) that the alleged false statement was not a statement of material fact, (that the soldier's sister was claiming insurance). Thus, the conviction was reversed for *failure of essential proof*, under 38 U. S. C. A. sec. 552, making it perjury to make a false statement of material fact in a claim for compensation or insurance, etc.

The decision is easily distinguishable from the instant case in that in the Hill case it was necessary for the government to prove that James Talty was a Notary Public, whereas in the instant case it merely had to be established that the Clerk of the United States District Court administered the oath, which would be supplemented by the judicial notice of the Court.

The case of *Sharron v. United States*, 11 F. 2d 629 (2 Cir. 1926), is not on the express point of sec. 558 and its requirements, but it does illustrate the consideration of an appeal from a conviction for perjury in the light of R. S. sec. 1025, 18 U. S. C. 556, *supra*, P.....

The statutes discussed are in *pari materia* with sec. 558. The Court says:

"Hardwick v. U. S., 257 F. 505, 168 C. C. A. 509 (C. C. A. 9) was like Baskin v. U. S., in alleging only that the accused knew facts inconsistent with his oath, without alleging what was the truth. In Gregorat v. U. S., 249 F. 470 (C. C. A. 5), 160 C. C. A. 428, there was no allegation of the truth and the court recognized that the indictment would have been bad at common law. It appears to be an authority for the rule we adopt. In Atkinson v. State, 133 Ark. 341, 202 S. W. 709, a statute like R. S. section 5396, was held to justify the allegation of falsity, without more. It would be tempting to say with Atkinson v. State that the clause in R. S. section 5396, was a warrant for this holding; we mean that



portion which requires only a 'proper averment to falsify the matter wherein the perjury is assigned'. However, as this goes back to the statute of 23 Geo. II, c. 11, we can hardly take that course. Rather we prefer to rest our decision upon R. S. section 1025, especially in view of *the present disposition of all courts to ignore formal defects which have no substantial relation to the merits of the controversy.*" (Emphasis ours.)

It is hardly to be supposed that the appellee here will contend that the defendant was or could be prejudiced by the asserted defect of this indictment, which was certainly "a matter of form only." We say a matter of form advisedly because, if our reasoning is valid, there are two *forms* in which the authority of the swearing officer may be stated: The one by a verbatim statement that the officer had authority to administer the oath, and second, by stating the specific facts from which the Court takes judicial notice that he had such authority.

See 41 American Jurisprudence, "Perjury," sec. 37.

How could the defendant have been prejudiced in this case by the use of the one form rather than the other?

It amounts to this: that the defendant was informed by this indictment that on October 22, 1945, she took an oath before the United States District Court for Montana, at Butte, Montana, at a time when said Court was engaged in a certain criminal case, naming it and naming the crime for which said cause was being prosecuted, and that said oath was administered to her as a witness by the Clerk of said Court. How could the defendant have been aided in her defense by the indictment containing the further averment that the Clerk had authority to swear the witness?



It is of further moment that the government has been unable to find any decision, and apparently the District Court had none before it, any stronger than the three above discussed; viz.,

*Barnard v. United States*, 162 Fed. 618, 623-624;

*Hilliard v. United States*, 24 F. 2d. 99;

*Pawley v. United States*, 47 F. 2d. 1024;

and particularly no case has been found in which it has been held, either before or after the enactment of the new Rules of Criminal Procedure, that an indictment was bad which alleged the oath to have been administered by the Clerk of the said Court in which the indictment under attack was filed. The record sets forth the entire colloquy between Court and counsel, and it appears to be the view of the District Court that a proper interpretation of section 558 compels the pleader in an indictment to set forth in the exact language or substantial words of that section the averment, which we deem conclusionary. Impliedly it seems to us the Court ruled that the intent of Congress in enacting section 558 in the year 1790 (1 Stat. 116), during the first administration of George Washington, that words and not facts are essential. It seems to us that the Court impliedly ruled that, by reason of this particular statute, a matter of judicial notice must be pleaded, and cannot be supplied upon the basis of facts alleged. There is no indication that the Court gave consideration to the question whether prejudice would have resulted to the defendant from the omission of the words under discussion.

Of course, there was a reason for inserting in sec. 558 the requirement that the authority of the person admin-

istering the oath should be stated. Oaths may be administered by many kinds of officers—notaries public, state magistrates, administrative commissioners of the states and of the United States, from the very lowest clerical person possessing a commission to the Chief Justice of the United States. It is, of course, proper for a prosecutor, charging perjury to have been committed before an inferior magistrate or administrative functionary, to plead and to prove that a foundation in law existed for the swearing of the witness and taking of his testimony. Of course, it is necessary that this be done where a possibility exists that the officer was without authority at the time and in the proceeding, or absence of proceeding, involved. *There is no dispute as to the substantial necessity for showing official capacity and jurisdiction.* The distinction insisted upon here is that in a case like the present, where the officer administering the oath is vested by the laws of the United States with appropriate power and where it is pleaded that such power was put in action in open court in the progress of a trial within the court's jurisdiction, the manner of alleging the swearing officer's authority need not be identical with the manner of such allegation in the case of a subordinate commissioner or notary public. The judicial knowledge of the Court from facts pleaded is what makes the distinction.

For the reasons above stated it is submitted that even prior to the enactment of the new Rules of Criminal Procedure the indictment was sufficient to state a public offense.

*B. Rule 7(c) As Affecting Section 558 of  
Title 18, United States Code.*

It is the Government's position that regardless of whether or not heretofore an averment in the indictment for perjury or authority to administer the oath must be made, since the adoption of the Federal Rules of Criminal Procedure, such allegation need not be made. Rule 7(c) thereof relates to indictments in general. The part of Rule 7(c) pertinent to this appeal provides:

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. \* \* \* It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. \* \* \*

Rule 7(c) and its companion rules became effective on March 21, 1946, under Enabling Acts of Congress<sup>1</sup> which had authorized their promulgation by the Supreme Court of the United States. Rule 7(c) itself was promulgated under the 1940 Act (18 U. S. C. 687) and is now the law of the land<sup>2</sup> because of the provision of that Act that "all laws in conflict therewith shall be of no further force or effect."

<sup>1</sup> Act of June 29, 1940, c. 445, 54 Stat. 688 (18 U. S. C. 687) covering proceedings prior to and including verdict or finding of guilt or innocence; Act of February 24, 1933, c. 119, 47 Stat. 904, as amended (18 U. S. C. 688), relating to appellate procedure. For further delegated authority to make procedural rules, see Act of November 21, 1941, c. 492, 55 Stat. 779 (18 U. S. C. 689), extending provisions of said Acts of 1940 and 1933, as amended, to criminal contempts, and the Act of May 9, 1942, c. 295, 56 Stat. 271 (18 U. S. C. 682) authorizing appeals by the Government from the District Courts.

<sup>2</sup> By successive Acts, commencing with that of September 29, 1789 (1 Stat. 93), and to the extents indicated therein, Congress has delegated its constitutional authority (Article III, Secs. 1 and 2) in respect of adjective law-making, and "the entire field of federal procedure is now within the regulatory power of the Supreme Court." (Hon. Alexander Holtzoff, Judge of the District Court of the District of Columbia, (and Secretary of the Advisory Committee that aided in the preparation of the new Rules), in an article "Reform of Federal Criminal Procedure," 3 F. R. D. 445 and 12 George Washington Law Review 119.)

Rule 7(c), as the Advisory Committee's note to this Rule states, "introduce a simple form of indictment." Rule 7(c) simply requires that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Only those facts necessary to establish the offense need be alleged in the indictment, and the elements of the offense of perjury are to be found in Section 231 of Title 18, U. S. C.

The new Rules, representing as they do, a *codification* of existing criminal procedural law in the Federal courts, with such changes as were deemed necessary to clarify and simplify those procedures, must control or supersede the former practice. As was said by Judge Holtzoff<sup>3</sup> in the article referred to in note 2, *supra*; 3 F. R. D. 445, 447:

The principal significance of the new federal criminal rules is found in the attempt to reform procedure and to make far-reaching improvements as they appear necessary. Existing procedure has been simplified and *numerous out-moded technicalities that originated several centuries ago have been eliminated*. Many of these technicalities were the culmination of humanitarian efforts to ameliorate the rigors of the criminal law at a time when it was almost savage in its ferocity. \* \* \* The simplification of procedure has been accomplished, however, without sacrifice of any safeguards that properly surround a defendant in a criminal case. \* \* \*

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<sup>3</sup> See also: Vanderbilt, 29 A. B. A. Jour. 376, 377; Homer Cummings, *ibid.* 654, 655; Vanderbilt, The New Federal Criminal Rules, 51 Yale L. Jour. 719; Hall, Objectives of Federal Criminal Procedural Revision, *ibid.* 723.

As stated by the Second Circuit in *United States v. Achtner*, 144 Fed. 49, at 51, the courts "are no longer bound by ancient and antiquated rules of common-law criminal pleading, and can now consider the adequacy of indictments on the basis of practical, as opposed to technical, considerations." This Ninth Circuit also adheres to the modern view of the sufficiency of criminal pleadings "on the basis of practical as opposed to technical considerations." *Hopper v. United States*, 142 F. 2d 181, 184, *supra*.

See also, *United States v. Martinez*, 73 Fed. Supp. 403 (M. D. Penna., 1947) decided under the new Rules of Criminal Procedure, wherein the court stated that they "discarded many of the technical requirements that had existed for centuries in regard to the form in which indictments should be drawn," with particular reference to the requirements of Rule 7(c).

And in the House Report No. 2492 to accompany H. R. 4587, 76th Congress, 3rd Session, which became the Enabling Act of June 29, 1940, *supra*, it is said:

The committee is of the opinion that the enactment of this legislation will promote the uniformity, simplicity, and flexibility of criminal pleadings, practice and procedure, and eliminate technicalities and delays in criminal cases.

A like statement appears in Senate Report No. 1934 on the same bill.

Section 558 of Title 18, U. S. C. was enacted in the Crimes Act of 1790 (1 Stat. 112, 116), and was patterned after an English statute, 23 George II, c. 11, whose purpose was to do away with the needless prolixity and pre-



cision required by the English statute on perjury, 5 Eliz., c. 9. *United States v. Cuddy*, (D. C. Cal. 1889) 39 Fed. 696, 697. The American statute embodied this procedural reform in our law. Nevertheless, it, too, retained some of the common law requirements, some of the vestiges of the archaic forms of pleading indictments. Section 558 thus required matters to be pleaded which were not elements of the offense of perjury as found in Section 231; and one of these elements is the subject of this appeal—"averring such court or person to have competent authority to administer the (oath) \* \* \*."

It is of interest to note that in both the English and American statutes the phrase "averring such court, or person, or persons to have a competent authority to administer the same" which follows the provision that it shall be sufficient in a prosecution for perjury for the indictment or information to set forth "the substance of the offense charged," and by what court, or before whom the oath was taken, is in *parenthesis*, thus apparently making the averment of authority to administer the oath merely part of the preceding, instead of a separate, jurisdictional requirement.<sup>4</sup>

In requiring additional elements to be pleaded in the indictment not found in the offense of perjury as defined in Section 231, Section 558, conflicts with the provision of Rule 7(c) that the indictment be a plain, concise statement of the essential facts constituting the offense. Under the provisions of the 1940 Enabling Act that all laws in conflict with the Rules shall be of no force or effect it is

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<sup>4</sup>The parenthesis was eliminated when the original statute was incorporated into the Revised Statutes (R. S. Sec. 5396), and now appears as in Section 558.



the Government's contention that Section 558 no longer has any validity, because of its inconsistency with Rule 7(c). To hold otherwise would violate the mandate and spirit of the Enabling Act. As said by the Supreme Court in *Sibach v. Wilson & Co.*, 312 U. S. 14, 16, in passing on certain of the Rules of Civil Procedure, (promulgated under a similar Enabling Act of June 13, 1934, 28 U. S. C. 723b, c):

\* \* \* it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the Enabling Act of 1934, was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth.

The scope of the simplification intended under Rule 7(c) is indicated in *United States v. Starks*, 6 F. R. D. 43, in which Judge Holtzoff in denying a motion to dismiss an indictment for forgery for failure to set forth the forged instrument in haec verba stated:

Assuming that at common law an indictment for forgery had to set out in haec verba the document charged to have been forged, it is the view of this Court that this requirement no longer prevails under the new Federal Rules of Criminal Procedure. Rule 7(c) provides that the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. The rule also contains the following provision:

"It"—meaning the indictment—"need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement."

\* \* \* \*

It is no longer necessary to comply with any technical requirements with which the common law was

replete in respect to the contents of an indictment. It must be borne in mind that these archaic standards of the common law originated in an era when practically every felony was punishable by death and the courts devised them as a means of avoiding the necessity of imposing death sentences. These technicalities have long been outmoded. They are no longer the law in the Federal courts. The Court will deny the motion.

The Government believes to be highly important and significant as indicating that Section 558 is now superseded by Rule 7(c) the fact that Congress, which had enacted the Rules of Criminal Procedure, "by subsequent action indicated their understanding that such effect was intended. That understanding appears in the proposed Revision of Title 18 of the United States Code, which has twice passed the House of Representatives, first on July 16, 1946, as H. R. 2200, 79th Cong., 2d Sess., and again on May 12, 1947, as H. R. 3190, 80th Cong., 1st Sess., and omits Section 558 of Title 18. Further, in both the Report from the House Committee on Revision of Laws to accompany H. R. 2200 (H. Rept. 152, Part II, pp. A194, A225) and the Report accompanying H. R. 3190 (H. Rept. 304, pp. A214, A243), Section 558 is listed as one of the laws omitted from revised Title 18 and included

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<sup>5</sup> *Sibbach v. Wilson*, *supra*, in deciding that the Rules of Civil Procedure were within the powers delegated by Congress, stated:

\* \* \* in accordance with the Act, the rules were submitted to the Congress so that the body might examine them and veto their going into effect if contrary to the policy of the legislature.

The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. \* \* \*

A similar opportunity for review by Congress was provided by the Enabling Act of 1940 in respect of Rule 7(c).

in the schedule of repeals for the reason that it is "Covered by Rule 7 of the Federal Rules of Criminal Procedure." Thus the Report of the Committee on the Judiciary on page 8, H. Rept. No. 304, 80th Cong., 1st Sess., stated:

Much work on part II was done in anticipation of the adoption of the new Federal Rules of Criminal Procedure, effective March 21, 1946.

These rules modify or supersede many criminal procedural sections. Consequently effect was given to the changes they make by revising modified sections and repealing superseded provisions.

And on page 9:

This method of specific repeal will lift from the courts the onerous task of ferreting out implied repeals.

And the further explanation is given (H. Rept. 304, p. A233) that the word "omitted" in the tables and texts of omitted sections indicates "that the text of the Revised Statutes or Statutes at Large was not incorporated in proposed Title 18 because it was obsolete, superseded by later law, or covered by the Federal Rules of Criminal Procedure." Inclusion of Section 558 of Title 18, U. S. Code (R. S. Sec. 5396), as omitted under the above provision, is found on page A243 of this Report.

Thus it is evident that one House of Congress believed Section 558 was no longer of any force or effect because it was inconsistent with the provision of Rule 7(c) providing that an indictment need only allege the essential elements of an offense.

It would appear, therefore, that all that is now required under Rule 7(c) is that the indictment contain a "plain, concise and definite statement" of the essential facts con-

stituting the offense charged. And it is the Government's contention that the indictment here under review, does include all the essential facts required to acquaint this defendant of the perjury charge brought against her under Section 231 of Title 18, U. S. C. The *essential* elements of perjury as found in Section 231 of Title 18 U. S. C. are found within the indictment. In view of the specific allegation in the indictment that the oath was administered by the Clerk of the District Court, it would seem clearly superfluous to have included the additional allegation that the clerk had authority to administer the oath, as being "other matter not necessary to such statement." Certainly it cannot be said that such an allegation is one of the "essential facts constituting the offense charged" within the meaning of Rule 7(c).

Respectfully submitted,

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## APPENDIX

## Section 231, Title 18, U. S. Code:

“Section 231. (Criminal Code, section 125.) Perjury. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than \$2,000 and imprisoned not more than five years.”

## Section 556, Title 18, U. S. Code:

“Section 556. Same; defects of form. No indictment found and present by a grand jury in any district or other court of the United States, shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. (R. S. section 1025.)”

## Section 558, Title 18, U. S. Code:

Section 558. Same; perjury. In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record of proceeding, either in law or equity, or any affidavit, deposition, or certificate, other

than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed. (R. S. section 5396.)”

#### Section 687, Title 18, U. S. Code:

“Section 687. Proceedings in criminal cases prior to and including verdict; power of Supreme Court to prescribe rules.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, and in proceedings before United States commissioners. Such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no further force and effect.”

#### Rules of Criminal Procedure, section 7(c):

“NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indict-



ment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

Section 525, Title 28, U. S. Code:

"Section 525. Commissioners, clerks and deputy clerks may administer oaths. Except as provided in section 591 of this title United States commissioners and all clerks and all deputy clerks of United States courts are authorized to administer oaths."



United States  
Circuit Court of Appeals  
For the Ninth Circuit

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UNITED STATES OF AMERICA,

Appellant,

vs.

MINA BICKFORD,

Appellee.

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Upon Appeal from the District Court of the United States  
for the District of Montana.

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BRIEF OF APPELLEE

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HARRISON J. FREEBOURN,  
Butte, Montana,  
Attorney for Appellee.

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No. 11801

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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ARGUMENT

On February 18, 1947, appellee, Minah Bickford, was charged by indictment, with having committed perjury on October 22, 1945. She was a gray-haired colored woman, a seventy-five dollar-a-month maid of all work, at 14 South Wyoming Street, in the heart of Butte, Montana.

On Friday, preceding the Monday on which appellee came to trial, District Judge, R. Lewis Brown, now deceased, and one of the best District Judges this District has had in the last forty years, called Mr. Pease, of counsel for appellant, and the writer, as counsel for ap-

pellee, to his office to discuss the allegations of the indictment, which he had been studying, preparatory to trial.

On Monday next, November 3, 1947, upon the opening of the trial, the motion to dismiss the indictment, as set out on page 5 of the Transcript of Record, was made. Then ensued the colloquy as appears on page 6 to and including 14 of the Transcript of Record.

The motion was good and the action of the Court proper. The indictment lacked a matter of substance and a necessary ingredient of the crime of perjury. It failed to aver or allege that the person administering the oath had authority to do so, as required by Section 558 of Title 18, U. S. Codes.

In *Hill v. United States*, 54 Fed. 2nd, p. 599, at page 602, the Court, after stating the indictment was bad, said:

“Again, there is no averment that James Talty had competent authority to administer the purported oath, as appears in the affidavit *supra*.

This averment seems to be a necessary one under the statute, which abbreviates the common law form of indictment for perjury and sets forth the substance of what it shall contain. U. S. Codes, title 18, sec. 558 (18 U. S. C. A. A. sec. 558).”

If Congress had intended that the “averring such court or person to have competent authority to administer the same” merely applied to Notaries, Commissioners and the like, it would have so stated. When it enacted such law, section 558, Title 18, U. S. Codes, it had in mind that part of Article III, section 1, of our Constitution which is as follows:

“The judicial power of the United States shall be vested in one supreme court, and such inferior courts as the Congress may from time to time ordain and establish.”

It had in mind one of those inferior courts, the district courts. If then, under the statute, it was necessary to aver the authority of the court to administer the oath, why should not such authority be necessary to aver when the clerk of such court administered the oath?

To constitute perjury or false swearing under the laws of the United States, it must appear that the officer administering the oath was authorized to do so by the laws of the United States.

U. S. v. Curtis, 107 U. S. 671, 2 S. Ct. 507, 27 L. Ed. 534.

A crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged.

Anderson v. U. S. (C. C. A. N. Y. 1923) 294 F. 593;

U. S. v. Geare (1923) 293 Fed. 997, 54 App. D. C. 30;

Moens v. U. S. (App. D. C. 1920) 267 F. 317;

Reeder v. U. S. (C. C. A. Okl. 1919) 262 F. 36, certiorari denied (1920) 40 S. Ct. 346, 252 U. S. 581, 64 L. Ed. 726.

An indictment for perjury is governed by the rule that the facts material to be charged must be stated clearly and explicitly.

Kovoloff v. U. S. (Ill. 1912) 202 F. 475, 120 C. C. A. 605, certiorari denied (1912) 33 S. Ct. 217, 226 U. S. 609, 57 L. Ed. 380.

An indictment for perjury that does not set forth the substance of the offense does not authorize judgment on a verdict of guilty.

Markham v. U. S. (1895) 16 S. Ct. 288, 160 U. S. 319, 40 L. Ed. 441;

Bartlett v. U. S. (Mont. 1901) 106 F. 884, 46 C. C. A. 19.

Counsel for appellant says that the absence of this averment does not prejudice appellee and under section 556, Title 18, U. S. Codes (appellant's brief, p. 23) the indictment is sufficient. Since the missing averment is one of substance, section 556 does not justify its omission. This section is only applicable where the only defect is that some element of the offense is stated loosely and without technical accuracy.

Harper v. U. S. (1909) 170 F. 385, 95 C. C. A. 555;

Horn v. U. S. (Mo. 1910) 182 F. 721, 105 C. C. A. 163, writ of certiorari denied (1911) 31 S. Ct. 470, 219 U. S. 585, 55 L. Ed. 347.

Naturally the defendant or appellee is gravely injured if denied the right to rely upon the omission of the averment of authority either as a matter of fact or of law. You might as well say that a defendant cannot be prejudiced by leaving out the name of the court, the date of the alleged offense, or the statement of the false oath, since she was present in the court, knew the date when it occurred, and knew the facts stated falsely.

There is no conflict between section 558 and section 7(c), Rules of Criminal Procedure (appellant's brief, p. 24). Both call for a plain, concise and definite statement

of essential facts. The authority to administer the oath can be alleged in no plainer, more concise and definite manner, than as set out in section 558.

Many of the cases cited by appellant are not in point. Nor can counsel for appellant take much satisfaction from *Barnard v. United States*, 162 Fed. 618 (appellant's brief, p. 5) since a reading of that case, page 622, clearly shows that the statute then, section 5392, was not as now, section 558, and the amendments made showing that Congress required a clear, definite statement and averment of the authority of the person to administer the oath.

We believe Judge Brown's decision should be affirmed and this appeal denied.

Respectfully submitted,

HARRISON J. FREEBOURN,  
Attorney for Appellee.





No. 11,802

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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GILBERT E. THIEL,

*Appellant,*

VS.

SOUTHERN PACIFIC COMPANY, a corpora-  
tion,

*Appellee.*

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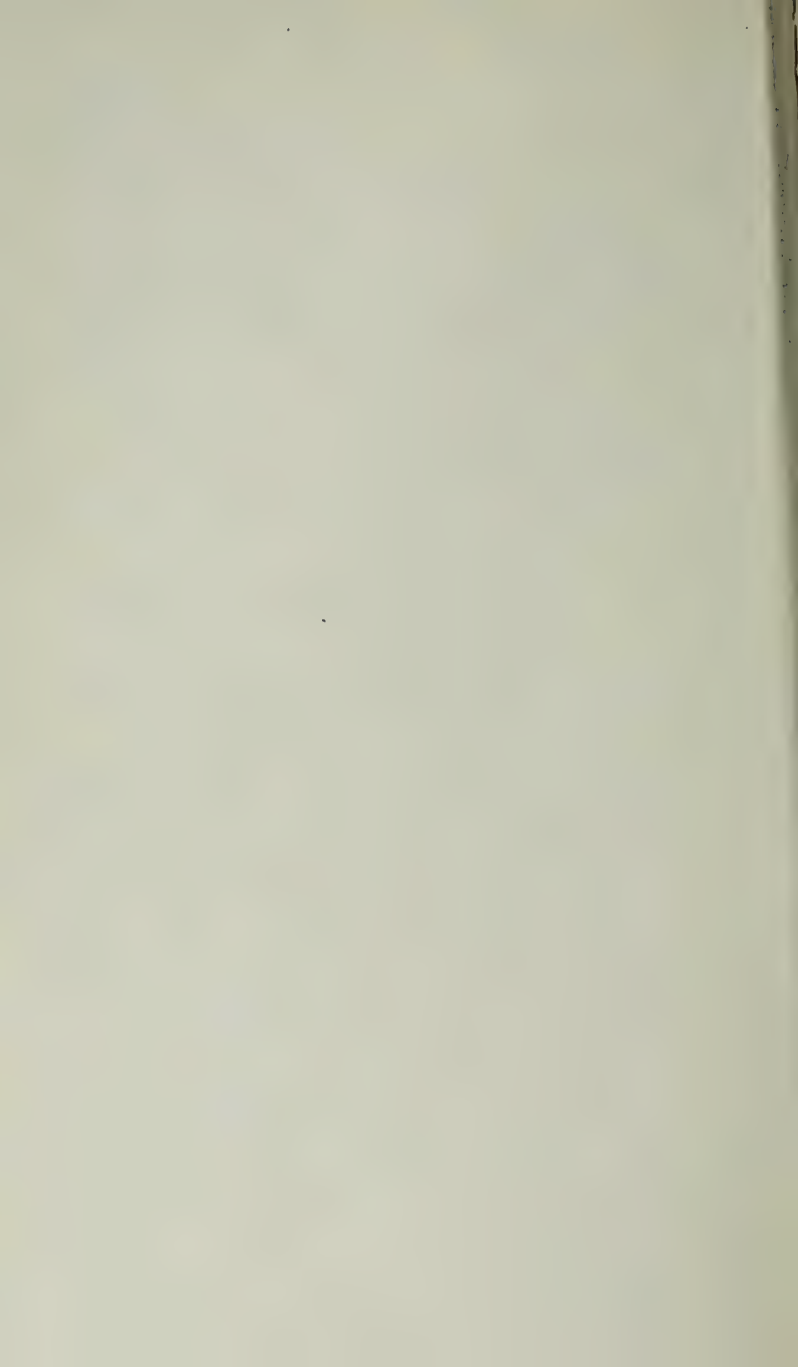
APPELLEE'S BRIEF

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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GILBERT E. THIEL,

*Appellant,*

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

*Appellee.*

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APPELLEE'S BRIEF

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I.

PRELIMINARY STATEMENT<sup>1</sup>

A. NATURE OF PETITIONER'S ACTION.<sup>2</sup>

Appellant, a salesman,<sup>3</sup> his wife and a male companion, Johnny Morris, spent Sunday, February 18, 1940, to Sunday evening, February 25, 1940, in Reno, Nevada. During that week, but not after noon of Saturday, the 24th, appellant drank and gambled. He was sober at the time of the

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1. Unidentified arabic numerals in parenthesis refer to the record. Figures before a colon indicate pages. Figures after colons indicate lines.

2. The facts and evidence are detailed below.

3. The complaint alleges appellant "was 28 years of age \* \* \* and was employed as a salesman" (4).

accident of this action. About 8:40 p.m., Sunday, the 25th, his wife, Morris and he, boarded appellee's Train No. 9 at Reno, to go to San Francisco, California. They sat in the second day-coach. The train left Reno about 8:50 p.m.

After the train left Reno, while it was in motion, appellant, Morris and a fellow passenger, Rippetoe, left the second coach and went forward to the smoker, the first day-coach. In the smoker appellant and Morris sat together, appellant next to the window, Morris toward the aisle. Rippetoe took the seat just ahead. About 25 minutes out of Reno, the conductor came through the smoker, lifting tickets. Morris surrendered the tickets for his party. The conductor had passed on, a step or two, when appellant, without warning, suddenly opened the window and jumped out, so fast that it was impossible for Rippetoe, Morris and the conductor to stop him.<sup>4</sup> They tried. Appellant was hurt.<sup>5</sup>

Appellant had no connection with appellee except that of a passenger. There was no relationship of employer and employee. His action was one by a passenger against a carrier for damages for personal injuries claimed by the passenger to have resulted from negligence of the carrier. His complaint shows on its face that the immediate cause of his injury was his own voluntary act.<sup>6</sup>

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4. The complaint alleges that "while said train was in motion" appellant "suddenly opened the window of said train and leaping out" was injured (2, 3).

5. This happened in Nevada between Verdi and the California line, in the mountains of the Truckee River Canyon (see 1165).

6. The complaint, in an attempt to avoid this, alleges that appellant "was not then in his normal mind by reason of excessive and continued drinking of alcoholic liquors"; that he "was in a highly depressed mental state over his marriage a week before"; that "while out of his normal mind and in said highly de-

## B. EARLIER PROCEEDINGS IN THE CASE.

This action was commenced in the California Superior Court for San Francisco, on December 30, 1940 (Complaint is at (1-4)). Appellee removed the action into the United States District Court for the Northern District of California, Southern Division,<sup>7</sup> and answered. It set up appropriate defenses by denial and affirmative statement<sup>8</sup> (6-11 and see 251-253).

An unsuccessful attack on the District Court's jurisdiction (see note 7) was followed by an attack on the jury panel which was overruled.<sup>9</sup> The case then went to trial before Judge Bowen, sitting in the Northern District of California, in November 1942 and resulted in a verdict

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pressed mental state" he "suddenly" opened the window and "leaping" out was injured (2, 3).

There is no further particularization; no claim he was completely out of his mind, wholly irresponsible, incapable of appreciating his surroundings, unable to comprehend the nature of his own acts or unable to care for himself.

7. Appellant twice moved to remand to the state court. His motions were denied. On appellee's petition attempts to proceed in the state court, in defiance of the orders of the District Court denying his motions, were enjoined. On appeal the decree was affirmed. (*Thiel v. Southern Pacific Company*, 126 F.2d 710 (C. C.A. 9, 1942) certiorari denied 316 U.S. 698, 86 L.ed. 1767.) This settled the jurisdiction of the court below.

The decision of this Court was followed by reckless and unsupported charges of unfairness, bias or fraud against everyone; of unfairness of this court; bias of the judge of the District Court; attacks on the Clerk and Jury Commissioner, the jury panel, the jurors selected to try the case, the judge who presided at the first trial, and, of course, appellee, its counsel and its witnesses. See appellee's brief on the first appeal after first trial of the merits, pages 5-8 (*Thiel v. So. Pac. Co.*, 149 F.2d 783, C.C.A. 9, No. 10,681) and record on that appeal.

8. The answer (6, 11) admitted appellant "had been" drinking (not that he was drunk), that he "suddenly opened the window" and leaped out and denied all charges of negligence. Other defenses set up appellant's own negligence, recklessness, wilful and wanton conduct, specifically setting up that his injuries were due to his own "independent, voluntary and wilful act." See Appellee's Brief, p. 4, on first appeal on the merits, C.C.A. 9, No. 10,681.

and judgment for the defendant (appellee).<sup>9</sup> Motions for judgment *n.o.v.* and for a new trial were denied.<sup>9</sup> On appeal to this Court the judgment was affirmed (No. 10,681; 149 F.2d 783). The Supreme Court granted certiorari "limited to the question whether petitioner's<sup>10</sup> motion to strike the jury panel was properly denied" (326 U.S. 716, 90 L.ed. 423) and on hearing of the petition reversed the judgment (328 U.S. 217, 90 L.ed. 1181).<sup>11</sup>

On the going-down of the mandate the case was again set down for trial upon the same pleadings<sup>12</sup> before the court and a jury from the July 1946 Term panel. A motion to strike the entire panel (30-34) was heard on August 19, 1946, testimony was taken, the matter was argued and submitted and the motion was denied<sup>13</sup> (147-237; 39 Opinion in Appendix C).

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9. The details of all this appear in the record in this court on the first appeal on the merits, No. 10,681 and see appellee's brief on that appeal, pages 6-9.

10. Plaintiff in the District Court, appellant in No. 10,681 and again appellant on this appeal.

11. The holding is dealt with in Part II below.

12. An attempt was made to amend the complaint but the defendant's (appellee's) objection was sustained (239-251; 63). No point is made of this ruling.

On the eve of the first trial, over objection, the complaint was amended by adding a third claim of negligence (par. VIIa). Defendant was not required to file a written answer but by the Court's order it was deemed that the amendment was "denied and answered." (No. 10,681, R. 140, 150-158; 13-27.) To avoid any question appellee, before the second trial, offered to file a written supplement to its answer (setting up, among other things, the statute of limitations which had been set up in its written objections to the amendment). The supplement was not filed on the statement of appellant's counsel that "I don't think it is necessary here. The record is clear", and his acquiescence in the understanding "that that amendment is adequately answered both negatively and affirmatively" (251-253).

13. This is all dealt with in Part II below. The court's opinion is reported in 67 F.Supp. 934, was filed August 28, 1946 and is set out at R. 39 et seq., and in Appendix C hereto.

The case went to trial before a jury<sup>14</sup> on September 10, 1946 (272) and ended on September 24, 1946 with a verdict for the defendant (appellee)(1028; 96) on which judgment was entered (97). Motions for judgment *n.o.v.* and for a new trial (99-115) were denied (116). This appeal followed.

The record on appeal was gotten up in a very irregular way. All matters do not appear in proper chronological order.<sup>15</sup> For this reason we append an index, enlarged beyond that in the record and containing a chronological schedule of all proceedings (App. A).

## II.

### **APPELLANT'S POINT ABOUT THE JURY IS NOT WELL TAKEN**

On June 6, 1946, the matter being regularly noticed on the Court's Calendar, published in The Recorder<sup>16</sup> (234:10-235:15) the jury panel for the July, 1946, Term was publicly drawn in open court before Judges Goodman and Roche.<sup>17</sup> The Court examined the Clerk (154-160) and

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14. The impanelment is covered in Part II below.

15. This is particularly true of certain testimony which was read from depositions or the record of the first trial. The record showing that it was read does not appear in its proper place and the testimony read appears at still a third place.

16. The calendars of the court below are regularly published Monday through Friday of each week in The Recorder, a paper of general circulation. On Judge Goodman's Calendar in The Recorder for Thursday morning, June 6, 1946, there appeared for 4 o'clock P.M. "In re selection of Master Jury Trial List—1946—July term of Court" (234:10-22). The statement of the attorney for the plaintiff that there was nothing in The Recorder (162:18) was in error.

17. The proceedings (154-162) were made part of the hearing on appellant's motion to strike the jury panel.



Jury Commissioner (160, 161) on how the names in the box had been selected, found that the names had been selected properly and ordered that 80 names be drawn for persons to be summoned as grand jurors and 300 names for persons to be summoned as trial jurors for the July, 1946, Term. This was done. (161:19-162:11)

Appellant, as his case approached trial, noticed a motion to strike the entire July, 1946, Term panel (30), the motion was heard August 19, 1946 (147-237), the proceedings of June 6, 1946, were made part of the record (154-162), testimony was taken and the motion was denied. (This is dealt with below in Part II-B.)

The case went to trial September 10, 1946, and on that day a jury, selected from the July, 1946, Term panel, was empaneled (272-279). With the constitutional 12, the Court selected an alternate juror (360-369).

**A. APPELLANT WAIVED ANY CLAIM THAT THE JURY PANEL WAS NOT PROPERLY CONSTITUTED.**

On the morning of the 6th day of trial, Wednesday, September 18, 1946, in chambers, the Court advised counsel for the parties that two jurors, Albert N. Wilmes and Miss Zola Taylor were unable to appear because of illness. In open court counsel agreed that they were satisfied that these jurors were ill. By stipulation the alternate juror, Mrs. Troupe (365), took Miss Taylor's place. The Court then stated that this made 11 jurors in the box and asked if counsel were willing to make a stipulation.<sup>18</sup> Counsel for appellant then stated:

"Yes, your Honor, plaintiff is willing to stipulate

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18. The stipulation had been agreed upon at the conference in chambers (1209:21-25).



that the trial may proceed **with the 11 jurors** and the verdict of **the 11 jurors** may have the same full force and effect as if returned by 12 jurors''<sup>19</sup>.

He added that the stipulation was entered into in the light of Rule 48.<sup>20</sup> Counsel for appellee joined in the stipulation and counsel for both parties announced that they were ready to proceed (725-728).

For the protection of the individual litigants various rules have been developed regulating the structure of courts (juries included) and judicial proceedings. Some have been thought sufficiently important to be guaranteed by the Constitution. Two are the right to trial by jury and to be represented by counsel. Yet even these rights, constitutional though they are, are so far personal to the individual that he can waive them. (*Adams v. U. S.*, 317 U.S. 269, 275, 87 L.ed. 268, 272;<sup>21</sup> *Hawk v. Olson*, 326 U.S.

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19. Counsel stipulated, of course, because he was completely satisfied with the jury he had and thought it would give him a verdict. He thought that for him it was a fair jury (see 1219:2-22). (Cf. *Carruthers v. Reed*, 102 F.2d 933, 938, col. 1 (C.C.A. 8, cert. den. 307 U.S. 643, 83 L.ed. 1523.) Having had his chance with it and lost he is not now entitled to say he did not think so "because we were discussing the thing informally in chambers" (1219:22).

20. "The parties may stipulate that the jury shall consist of any number less than twelve \* \* \*."

21. The court said: "This brings us to the merits. They are controlled in principle by *Patton v. United States*, 281 U.S. 276, 74 L.ed. 854, 50 S.Ct. 253, 70 A.L.R. 263 and *Johnson v. Zerbst*, 304 U.S. 458, 82 L.ed. 1461, 58 S.Ct. 1019. The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel. \* \* \* The relation of trial by jury to civil rights—especially in criminal cases—is fully revealed by the history which gave rise to the provisions of the Constitution which guarantee that right. Article 3, Sec. 2, Para. 3; Sixth Amendment; Seventh Amendment. That

271, 279, 90 L.ed. 61, 67; *Wood v. Howard*, 157 F.2d 807 (C.C.A. 7,—cert. den. 331 U.S. 814, 91 L.ed. (Adv. Op.) 1075); *People v. Nakis*, 184 Cal. 105, 111, 193 P. 92.<sup>22</sup> Cf. *Breese v. U. S.*, 226 U.S. 1, 11, 57 L.ed. 97, 102.<sup>23</sup>)

Within this rule claimed defects in the construction of a jury list or jury panel can be waived. Good grounds of challenge to the array (or for motion to strike or to quash the panel) can be waived and are, in fact, waived if the objection is not made in time or is not made in sufficiently precise form.<sup>24</sup> (*U. S. v. Gale*, 109 U.S. 65, 77, 27 L.ed. 857, 858;<sup>25</sup> *Agnew v. U. S.*, 165 U.S. 36, 41 L.ed. 624;<sup>26</sup> *Powers v. U. S.*, 223 U.S. 303, 312, 56 L.ed. 448, 452;<sup>27</sup> *Hyde v. U. S.*, 225 U.S. 347, 373, 56 L.ed. 1114, 1128;<sup>28</sup> *Turher v. U. S.*, 66 Fed. 280, 285 (C.C.A. 5);

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history is succinctly summarized in the Declaration of Independence in which complaint was made that the Colonies were deprived 'in many cases, of the benefits of Trial by Jury.' But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property.' "

22. The sheriff, the officer designated to summon juries, was disqualified. The court, improperly, instead of designating the coroner designated an elisor who summoned the jury. Held, that the objection was waived.

23. The claim was that the grand jury was not present when the foreman presented an indictment.

24. The same rule applies to grounds of challenge to individual jurors. *Kohl v. Lehlbach*, 160 U.S. 293, 302, 40 L.ed. 432, 435; *Strang v. U. S.*, 45 F.2d 1006 (C.C.A. 5, cert. den. 283 U.S. 835, 75 L.ed. 1447) and 53 F.2d 820 (C.C.A. 5, denying writ of error coram nobis).

25. Objection was made that a statute excluding certain persons from the grand jury was unconstitutional.

26. Claimed that a special venire was improperly returned from part only of the District. Waiver was one of the grounds for rejecting the claim.

27. The claim was that the grand jury was not properly summoned and sworn.

28. The claim was that the jury commissioners improperly delegated their functions to a third person.

In *Francis v. Southern Pacific Company*, .... U.S. ...., 92 L.ed. (Adv. Op.) 610, 614, 68 Sup. Ct. Rep. 611, 614 the Court said:

“Petitioners contend that the jury panel from which the jury in this case was selected was drawn contrary to *Thiel v. Southern P. Co.*, 328 U.S. 217, 90 L.ed. 1181, 66 S. Ct. 984, 166 A.L.R. 1412. We do not stop to inquire into the merits of the claim. The objection was made for the first time in the motion for a new trial. It seems to have been an afterthought, as the Thiel Case was decided a few weeks after the verdict of the jury in the present case. If not an afterthought, it is an effort to retrieve a position that was forsaken when it was decided to take a gamble on the existing jury panel. In either case the objection comes too late. Cf. *Queenan v. Oklahoma*, 190 U.S. 548, 552, 47 L.ed. 1175, 1178, 23 S. Ct. 762.”

In the *Queenan Case*, the claim was of disqualification of an individual juror for conviction of a felony. Proper objection was not made at the time of discovery of the fact. Held, that the defendant “could not speculate on the chances of getting a verdict and then set up that he had not waived his rights.”

271, 279, 90 L.ed. 61, 67; *Wood v. Howard*, 157 F.2d 807 (C.C.A. 7,—cert. den. 331 U.S. 814, 91 L.ed. (Adv. Op.) 1075); *People v. Nakis*, 184 Cal. 105, 111, 193 P. 92.<sup>22</sup> Cf. *Breese v. U. S.*, 226 U.S. 1, 11, 57 L.ed. 97, 102.<sup>23</sup>)

Within this rule claimed defects in the construction of a jury list or jury panel can be waived. Good grounds of challenge to the array (or for motion to strike or to

*Haussener v. U. S.*, 4 F.2d 884, 887 (C.C.A. 8);<sup>29</sup> *McNichol v. U. S.*, 9 F.2d 623 (C.C.A. 6);<sup>30</sup> *U. S. v. Meyer*, 113 F.2d 387, 396 (C.C.A. 7,—cert. den. 311 U.S. 706, 85 L.ed. 459) and cases cited; *Johnson v. Williams*, 244 Ala. 395, 13 So. 2d 687; *People v. McCrea*, 303 Mich. 213, 6 N.W.2d 489, 514; *Johnson v. State*, 143 Tex. Cr. 54, 156 S.W.2d 986; *Gay v. City of Eugene*, 53 Or. 289, 100 Pac. 306.)

The rule of waiver has been applied to a claimed improper inclusion of women on a jury panel (*Zito v. U. S.*, 64 F.2d 772 (C.C.A. 7)),<sup>31</sup> to claimed improper exclusion of women (*Wuichet v. U. S.*, 8 F.2d 561, 562 (C.C.A. 6,—cert. den. 270 U.S. 561, 70 L.ed. 781) and see *Ballard v. U. S.*, 329 U.S. 187, 91 L.ed. (Adv. Op.) 195, 196<sup>32</sup>) and to claimed improper exclusion of a class because of race or color (*Bush v. Kentucky*, 107 U.S. 110, 27 L.ed. 354;<sup>33</sup> *Williams v. Mississippi*, 170 U.S. 213, 223, 42 L.ed. 1012, 1016;<sup>34</sup> *Franklin v. South Carolina*, 218 U.S. 161, 167, 54

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29. The challenge was insufficient in form.

30. It was claimed the jurors were "repeaters" and did not come from the body of the district. Beyond this counsel declined to state in what respect the jurors were not properly selected. Held, that any point was waived because of insufficiency of statement of the grounds of challenge.

31. The claim was based on the circumstance that less than 30 days after sentence the Illinois statute providing for the inclusion of women was declared unconstitutional.

32. This case held that the point had not been waived but the court's discussion makes it clear that the objection that women were improperly excluded could be waived and would be waived by failure appropriately to make the point.

33. Held, that the motion to set aside the petit jury panel was properly overruled "for the reason, among others, that the grounds upon which it was rested do not clearly and distinctly show that the officers who selected and summoned the petit jurors excluded from the panel qualified citizens of African decent because of their race or color."

34. The Court took occasion to notice "that there is nothing direct and definite in this allegation either as to means or time as affecting the proceedings against the accused."



L.ed. 980, 984;<sup>35</sup> *U. S. v. Brady*, 47 F.Supp. 362,<sup>36</sup> aff'd 133 F.2d 476<sup>37</sup> (C.C.A. 4,—cert. den. 319 U.S. 746, 87 L.ed. 1702 reh. den. 319 U.S. 784, 87 L.ed. 1727); *Carruthers v. Reed*, 102 F.2d 933, 937 (C.C.A. 8,—c.d. 307 U.S. 643, 83 L.ed. 1523);<sup>38</sup> *State v. Wilson*, 204 La. 24, 14 So.2d 873, app. dis. 320 U.S. 714, 88 L.ed. 419; *Hicks v. State*, 143 Ark. 158, 220 S.W. 308 c.d. 254 U.S. 630, 65 L.ed. 447; *Washington v. State*, 95 Fla. 289, 116 So. 470 c.d. 278 U.S. 599, 72 L.ed. 528.<sup>39</sup> Cf. *Virginia v. Rives*, 100 U.S. 313, 25 L.ed. 667).

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35. "There was no allegation in the motion to quash upon this ground, or offer of proof to show that persons of the African race were excluded because of their race or color \* \* \*." The court notices that it was "essential to aver" as well as prove the fact relied upon.

36. At page 367 the court notices the failure properly to present the point.

37. At page 480 and following the court speaks of the failure properly to present the point as a "waiver." It said that "the failure of experienced counsel, for reasons of their own, to offer the necessary proof to support the charge was as deliberate and effective a waiver as if the point had not been made at all. That a defendant, especially when represented by counsel, may make a competent and intelligent waiver of a constitutional right binding upon him is well established by repeated decisions." The point "of racial discrimination was raised so inadequately \* \* \* that in effect it was not raised at all and was therefore waived."

38. After the trial it was claimed that negroes were systematically excluded from grand and petit juries. But the point was not raised because counsel feared to prejudice his case and because he thought he had a good jury. "Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interest, they can not be permitted at a later time, after a decision has been rendered adverse to them, to obtain a retrial according to procedure which they voluntarily discarded and waived."

39. These three state cases were cases of claimed racial discrimination. Since a constitutional right was involved the procedure as well as the substance presented a federal question and whether the question was properly raised was a federal question. It was so held in *Carter v. Texas*, 177 U.S. 442, 447, 44 L.ed. 839, 841.



Where objection has been made to the jury and, thereafter, there is an agreement to proceed with the jury in the box, that stipulation effectively waives any objection to the jury. In *Bank of Grottoes v. Brown*, 8 F.2d 382 (C.C.A. 4) it was claimed that the Court improperly excluded from the jury all persons who were directors or stockholders in any bank or renters of safe deposit boxes. The Court held it was unnecessary to consider the point. After the jury retired it twice reported inability to agree. "Apparently, at that time, neither party wanted to be put to the expense and delay of a new trial and they mutually stipulated to accept a majority verdict. The Bank then knew who were on the jury and the agreement made was clearly a waiver of any objection to the way in which they were originally selected." In *Hoagland v. Chestnut Farms Dairy*, 72 F.2d 729 (C.A. for D.C.) a juror became sick. This left 10 men and an unmarried woman. On the suggestion that the testimony would be such as to cause her embarrassment the Court announced it would withdraw her and did so over the objection of plaintiff's counsel stating it would either discharge the remaining 10 jurors or proceed with the 10. Counsel for the parties then agreed to proceed with the 10. The Court said: "It is, of course, very clear that the appellant having consented to proceed with the remaining 10 male jurors cannot now complain."<sup>40</sup>

A party can not do what is attempted here. He can not

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40. Compare the related question of consent to trial of a law issue on the equity side (*Williamson v. Chic, etc. Corporation*, 59 F.2d 918, 921 (C.C.A. 8); *Penley Bros. Co. v. Hall*, 84 F.2d 371, 373 (C.C.A. 1); *U. S. v. Havner*, 101 F.2d 161, 165 (C.C.A. 8)) and consent to try an equitable issue on the law side (*Mobile Ship Building Co. v. Federal Etc. Co.*, 280 Fed. 292 (C.C.A. 7, cert. den. 260 U.S. 726, 67 L.ed. 483).

agree to go forward with a jury in the box whose composition is known, take a chance that he will receive a favorable verdict and then raise the point that he was prejudiced by the composition of the jury if the result is against him. In the *Carruthers Case* the Court pointed this out in language quoted in note 38. Compare *Adams v. U. S.*, supra:

“Simply because a result that was insistently invited, namely, a verdict by a Court without a jury, disappointed the hopes of the accused ought not to be sufficient for rejecting it.”

In *Strang v. U. S.*, supra, 45 F.2d at 1007 the Court said:

“Upon the showing made after verdict, the conclusion is inescapable that appellant was speculating on his chances of being acquitted, intending to rely on the disqualification of the juror only in the event he was convicted. He could not do this, but must be held to have waived the ground of challenge for cause based on the disqualification of the juror.”

Compare, also, *Riley v. Davis*, 57 Cal. App. 477, 484, 207 P. 699 (hr. den.)<sup>41</sup> and *Fay v. New York*, 332 U.S. 1517, 91 L.ed. (Adv. Op.) 1517, 1528 bot. col. 2.<sup>42</sup>

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41. “Moreover, it is equally plain that if any disqualification existed it was waived by the failure of appellant to make timely objection. \* \* \* He chose, however, to take his chances upon receiving a favorable verdict; and in such cases the just and well-established rule is, that, after the case goes against him, he cannot object to the validity of the verdict because of circumstances within his knowledge which he has declined to seasonably urge. \* \* \* The authorities, indeed, seem to be uniform that a known cause of challenge is waived by holding it until after verdict, ‘since such practice is incompatible with good faith and fair dealing which should characterize the administration of justice.’ ”

42. “It is not easy, and it should not be easy, for defendants to have proceedings set aside and held for naught, on constitutional grounds when they have accepted as satisfactory all of the individual jurors who sat in their case \* \* \*.”

**B. THERE WAS NO MERIT IN THE MOTION.**

The applicable statutes are set out in Appendix B. The grounds of the motion to strike the entire jury panel (30-34) which are still urged (App't's Br. 5, 31-42)<sup>43</sup> are:

1. The "vast majority" of those selected "are businessmen, business executives, wealthy persons, and those in the higher income brackets," that these "constitute an excessive percentage of all those eligible as jurors" and the percentage "is grossly disproportionate," a "small minority" are "working men and those of average income or less," they constitute any "insufficient percentage \* \* \* and said percentage is grossly disproportionate" and this selection has been made purposely (Grounds 1 and 2).

2. "A larger proportion of men jurors has been purposely selected for said panel, thus discriminating against women" (Ground 3).

3. There was no Court order directing the parts of the district from which jurors should be returned and selec-

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43. Other grounds stated in the motion have not been argued and are abandoned. Ground 5 was that the Court had made no order to bring about compliance with the mandate of the Supreme Court and the matter of selection has been left to the discretion of the Jury Commissioner and the Clerk. The Statute commits this matter to their discretion. We deal with this matter below.

Ground 6 says that no substantial change has been made in the method of selection since the decision of the Supreme Court. The claim is unsubstantiated.

Ground 7 was that a large majority of those selected was connected with large business concerns having business with the defendant or social connections with officials of the defendant. This ground was not made out.

Ground 8 was that the Clerk and Jury Commissioner purposely endeavored to obtain jurors of superior intelligence basing selection solely on wealth and high income. This ground was not made out.

tion was not made on any basis of fair geographic distribution (Ground 4).

4. "No system of lot or chance was used in selecting jurors for said panel but each and every juror was personally selected by said jury commissioner or said clerk" (Ground 9).

The grounds were not that any class had been excluded but rather that it had not been included in proper proportions. Appellant's argument follows the same lines. It does not claim that any class was excluded but rather that the proportions of the classes (as Appellant elects to classify) do not correspond with the proportions for the same classes in this area as reflected by the United States census. In short, the grounds of motion and the argument are that a jury panel must be made of the various "classes" of eligible jurors in the same proportion that the classes are found in the community. The argument is that there should be proportional representation.

Attention first must be given to the decision on appeal from the first judgment (*Thiel v. Southern Pacific Company*, 328 U.S. 217, L.ed. 1181). The various claims now made (perhaps somewhat differently expressed, but in substance the same) were before the Supreme Court.<sup>44</sup>

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44. The questions were presented by notice of motion filed November 5, 1942 (R. No. 10,681, p. 9-11). The grounds (R. No. 10,681, pp. 10, 11), rearranged, were:

1. The judges of the District Court failed to prescribe any rules of qualification or otherwise for selection of jurors.

2. The judges of the District Court failed to provide necessary facilities or funds for proper investigation of prospective jurors.

3. The selection of jurors "is arbitrary because no examination whatever is made of said jurors before they are put on said **panel** to ascertain their qualifications or particularly their unfitness" by reason of connections with or prejudice in favor of "gigantic corporations" like respondent.

It particularly noticed the ground of want of proportional representation.<sup>45</sup> It did not sustain them but placed its decision, as Appellant's brief correctly states at p. 35, on "the sole ground" that there had been "exclusion of daily wage earners from the panel."<sup>46</sup>

The controlling considerations applied by the Court (said in *Ballard v. U. S.*, 329 U.S. 187, 91 L.ed. (Adv.

4. No effort is made to apportion jurors "by districts."

5. By the acts of the clerk and jury commissioner "which may even appear fair on their face," defendant has prevailed in every personal injury action for the past nine years, and by reason of that fact it will be impossible for plaintiff to prevail and he will be denied trial by an impartial jury.

6. There has been class discrimination in "selecting" jurymen "on said panel" in this:

(a) A larger proportion of men is selected, thus discriminating against women.

(b) There is no effort to proportionately or fairly represent citizens of all races, thus systematically excluding Negroes and Chinese.

(c) Mostly business executives or those having the employer's viewpoint are selected, discriminating against other occupations and classes, particularly employees and poor people; plaintiff was regularly employed as a wage earner, and by consequence he is denied equal protection of the laws.

Plaintiff's own statement of the grounds appears at page 40 of the printed Petition for Certiorari and Brief in Support Thereof. The petition made and argued the points that (1) mostly business executives were selected and people of the working class were discriminated against (pp. 4-6, 16, 20, 39, 40), (2) more men than women were selected (pp. 4-6, 16, 20, 21, 40), (3) 28 U.S.C. §413 was not complied with and the names were not properly apportioned in the district (pp. 5, 16, 40, 45), and (4) the Clerk and Jury Commissioner personally picked the names—they did not result from any system of selection by chance (pp. 2, 39, 40).

45. At 328 U.S. 219 and 90 L.ed. 1184 the court quoted the stated ground that "mostly business executives or those having the employer's view-point are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes" etc.

46. Compare the dissenting opinion of Mr. Justice Frankfurter. In *Ballard v. United States*, 329 U.S. 187, 91 L.ed. (Adv. Op.) 195, the court stated as the controlling fact in the *Thiel Case* that "all persons who worked for a daily wage had been deliberately and intentionally excluded from the jury lists."



Op.) 195, 197 to be the gist of the ruling and this language was quoted) were stated as follows:

“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.\* \* \* **This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community;** frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.”

The Court states the facts to which these considerations were applied and its holding as follows:

“Both the Clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury lists all persons who worked for a daily wage. \* \* \* Thus the admitted discrimination was limited to those who worked for a daily wage, many of whom might suffer financial loss by serving on juries at the rate of \$4 a day and would be excused for that reason. The exclusion of all those who earned a daily wage cannot be justified by Federal or state law.”



The Court ignored the claims that the jury list was improper because "mostly business executives" etc. were selected and that there was not a sufficient portion of women,—it ignored the claim that there should be proportionate representation,—it ignored the claim that 28 U.S.C. §413 had been disregarded and that the names were not properly apportioned in the District, and it ignored the claim that the names were personally selected by the Clerk and jury commissioner (hand-picked) and were not selected by some scheme of chance. To the contrary on this last it expressly reaffirmed the rule that this was a matter for the discretion of those designated by statute as responsible for the list and said:

"The choice of the means by which unlawful distinction and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers."

It is apparent from the decision in the *Thiel Case* and from the later decisions of *Ballard v. U. S.*, supra and *Fay v. New York*, 332 U.S. 261, 91 L.ed. (Adv. Op.) 1517 that the court was not disturbing established and well-understood rules governing the preparation of jury panels and the determination of challenges to the array.

The established rules can be shortly stated:

The 7th Amendment guarantees to litigants in Federal courts "the basic institution of jury trials in only its most fundamental elements" (*Galloway v. United States*, 319 U.S. 372, 390, 87 L.ed. 1458, 1471, reh. den. 320 U.S. 214, 87 L.ed. 1851; *United States v. Wood*, 299 U.S. 123, 81 L.ed. 78, reh. den. 299 U.S. 624, 81 L.ed. 459), as those elements were developed at the common law (*Capital*

*Traction Co. v. Hof*, 174 U.S. 1, 43 L.ed. 873; *Thompson v. Utah*, 170 U.S. 343, 42 L.ed. 1061), with liberty to adjust details to make them congenial to the environment (*Galloway and Wood Cases*; *State v. Mercier*, 98 Vt. 368, 127 A. 715). The procedure developed was "not to enable the" party "to select jurors, but to secure an impartial jury." The Constitutional right was maintained, and a party had no cause of complaint, if his case was tried by a fair and impartial jury. (*Brown v. New Jersey*, 175 U.S. 172, 175, 44 L.ed. 119, 121; *Howard v. Kentucky*, 200 U.S. 164, 50 L.ed. 421; *Ex parte Spies*, 123 U.S. 131, 168, 31 L.ed. 80, 87; *Virginia v. Rives*, 100 U.S. 313, 25 L.ed. 667; *Fay v. New York*, 332 U.S. 261, 91 L.ed. (Adv. Op.) 1517, 1532; *People v. Parman*, 14 C.2d 17, 92 P.2d 387.) He had such a jury if it was drawn from a list so selected that the list could be said to be fairly representative of the community<sup>47</sup> (*Glasser v. United States*, 315 U.S. 60, 86 L.ed., 680 reh. den. 315 U.S. 827, 86 L.ed. 1222 (1942); *Smith v. Texas*, 311 U.S. 128, 85 L.ed. 84 (1940)). It was representative of the community,<sup>48</sup> even if some classes

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47. Against bias or other disqualification of a particular juror he was protected by challenge to the polls. *Aldridge v. United States*, 283 U.S. 308, 75 L.ed. 1054 (class prejudice is a proper matter for inquiry on the voir dire examination); *United States v. Wood*, 299 U.S. 123, 81 L.ed. 78, reh. den. 299 U.S. 624, 81 L.ed. 459; *State v. Brooks*, 57 Mont. 480, 188 P. 942 (prejudice against I.W.W.). See also, *Reynolds v. U. S.*, 98 U.S. 145, 25 L.ed. 244; *State v. Lloyd*, 138 Wash. 8, 244 P. 130; *Vega v. Evans*, 128 Ohio St. 535, 191 N.E. 757; *Sherman v. Ryan & Sons*, 126 Conn. 574, 13 A.2d 134; *State v. Lauth*, 46 Or. 342, 80 P. 660; *State v. Mercier*, supra.

48. And "community" must be understood to mean only those "citizens" of proper age who have their "natural faculties" and "ordinary intelligence," are "not decrepit," are "of fair character and approved integrity, and of sound judgment," and have not been "convicted of malfeasance in office or any felony or other high crime." (Cal. C.C.P. §§198, 199, 205, App. B, pp. 14 et seq.)

were excluded, provided "the exclusion was not the result of race or class prejudice," the persons excluded were not such as "to make them act otherwise than those who were drawn would act" and "a sufficient number of unexceptional persons were present." (*Rawlins v. Georgia*, 201 U.S. 638, 640, 50 L.ed. 899, 900 (1906); *People v. Prior*, 294 N.Y. 405, 63 N.E. 2d 8, 11 (1945).<sup>49</sup>)

Our peculiarly American development (see note 49) came in criminal cases under the 14th Amendment and the Acts of 1875<sup>50</sup> (8 U.S.C. Sec. 44) and 1879 (Jud. Cod. Sec. 276, 28 U.S.C. Sec. 412). The result of the early

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49. Compare *People v. Arceo*, 32 Cal. 40, 45, quoting Mr. Justice Storey's opinion in *United States v. Cornell*, 9 Mason 91, Fed. Cas. No. 14,868; *Shettel v. United States*, 113 F.2d 34 (C.A. for Dist. Col., quoting the *Cornell Case* in note 11.

This goes beyond the common law. At common law, the array was not subject to challenge so long as the officer who prepared it (at common law the sheriff) stood indifferently as to the parties and issues. See 3 *Bl. Com.*, 359; 2 *Comyns, Digest*, 3 ed., 200 (Challenge, (B) Challenge to the Array); 19 *Halsbury's Laws of England*, 2 ed., 303 (Title Juries, par. 631); *Proffatt, Jury Trial* (1880), §§149 et seq.; *Thompson & Merriam, Juries* (1882), §126.

The total absence of discussion of the question in the case at bar in *Proffatt*, and the almost casual reference to the decisions of the Supreme Court of 1880 and 1881 in *Thompson & Merriam*, speak volumes.

50. Before 1875 there is no reference in any Federal statute (as to state statutes see App. B, p. 10, note 7), nor, so far as we are aware, is there any Federal decision (certainly none of the Supreme Court), touching on exclusion of general classes from jury service. The first statute expressly referring to jurors is the Act of March 1, 1875 (see App. B, p. 10, note 7), which applies to both state and Federal courts and deals only with classification on the basis of "race, color, or previous conditions of servitude." The first reference to party affiliation as a possible line that might be drawn in making arbitrary exclusions, is in the Act of June 30, 1879, c. 52, §2, 21 Stat. 43 (Jud. Cod., §276, 28 U.S.C.A., §412, App. B, p. 7). There are no decisions of the Supreme Court dealing with any claimed exclusion to which one or the other of these statutes did not apply except *Rawlins v. Georgia*, 201 U.S. 638, 50 L.ed. 899, until *Glasser v. United States*, 315 U.S. 60, 86 L.ed. 680 (1942).

cases<sup>51</sup> was summarized by the Supreme Court in 1896 in *Gibson v. Mississippi*, 162 U.S. 565, 40 L.ed. 1075.<sup>52</sup> Later cases have added little and have hardly varied the form of expression.<sup>53</sup> The rule can fairly be stated to be this:

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51. The main body of principles and rules dealing with claims of improper exclusion from jury lists was worked out in five cases decided from 1880 to 1883. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.ed. 664; *Virginia v. Rives*, 100 U.S. 313, 25 L.ed. 667; *Ex Parte Virginia*, 100 U.S. 339, 25 L.ed. 676; *Neal v. Delaware*, 103 U.S. 370, 26 L.ed. 567; *Bush v. Kentucky*, 103 U.S. 110, 27 L.ed. 354. *Wood v. Brush*, 140 U.S. 278, 35 L.ed. 505 quotes and follows the *Neal Case* and is itself followed in *Jugiro v. Brush*, 140 U.S. 291, 35 L.ed. 510.

52. Followed in *Smith v. Mississippi*, 162 U.S. 592, 40 L.ed. 1082 and *Murray v. Louisiana*, 163 U.S. 101, 41 L.ed. 87.

53. *Carter v. Texas*, 177 U.S. 442, 44 L.ed. 839 stated the rule that equal protection of the laws was denied a colored defendant where "all persons of the African race were excluded, solely because of their race or color." Its statement was adopted by quotation in *Norris v. Alabama*, 294 U.S. 587, 79 L.ed. 1074, the court adding that "this statement was repeated in the same terms in *Rogers v. Alabama*, 192 U.S. 226, 231, 48 L.ed. 417, 419, 24 S.Ct. 257, and again in *Martin v. Texas*, 200 U.S. 316, 319, 50 L.ed. 497, 498, 26 S.Ct. 338." *Franklin v. South Carolina*, 218 U.S. 161, 167, 54 L.ed. 980, 985 said the proper rule was laid down in the *Carter and Rogers Cases* and the *Martin Case* was quoted and followed in *Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 514 and these last two were cited and applied in *Ruthenberg v. United States*, 245 U.S. 480, 482, 62 L.ed. 414, 418. *Hale v. Kentucky*, 303 U.S. 613, 616, 82 L.ed. 1050, 1052 reversed because the proof showed "a systematic and arbitrary exclusion of negroes from the jury lists solely because of their race and color." *Smith v. Texas*, 311 U.S. 128, 129, 85 L.ed. 84, 86 uses the expression "intentionally and systematically excluded from grand jury service solely on account of their race and color." *Glasser v. United States*, 315 U.S. 60, 86, 86 L.ed. 680, 707 reh. den. 315 U.S. 827, 86 L.ed. 1222, in a dictum, condemned "deliberate selection of jurors from the membership of particular private organizations." *Hill v. Texas*, 316 U.S. 400, 86 L.ed. 1559 speaks of the problem as one "of racial discrimination," and rests heavily on *Neal v. Delaware* and §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44). *Akins v. Texas*, 325 U.S. 398, 89 L.ed. 1692 uses the language "arbitrary and purposeful limitation," "purposeful discrimination," "deliberate and intentionally limited," and says that "a purpose to discriminate must be present."



A party entitled to a trial by jury is entitled to have the list from which the jurors will be drawn so prepared that class prejudice has not worked a **systematic, arbitrary and purposeful** discrimination against and exclusion of fellow members of a class determined by race, color, party affiliation, or other consideration irrelevant to the performance of a high duty of citizenship and such that the exclusion will, or might reasonably be expected to, reflect itself in the jury's determination, **solely because of membership in that class.**

The right is **not** of **inclusion** on the jury list of any particular person or class, or to a particular sort of jury. The right is only that there shall be no **systematic, purposeful, and arbitrary exclusion** of qualified and non-exempt persons **solely because of membership in a class** determined by prejudice and irrelevant considerations.

“A mixed jury, some of which shall be of the same race with the” party “cannot be demanded, as of right, in any case” (*Martin v. Texas*, 200 U.S. 316, 50 L.ed. 497). There is no right to have on the list or jury **any** member of the class to which the challenging party claims to belong. (*Virginia v. Rives*, note 51 above; *Neal v. Delaware*, note 51 above; *Bush v. Kentucky*, note 51 above; *Wood v. Brush*, 140 U.S. 278, 285, 35 L.ed. 505, 508; *Jugiro v. Brush*, 140 U.S. 291, 35 L.ed. 510; *Gibson v. Mississippi*, above; *Martin v. Texas*, above; *Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 514; *Akins v. Texas*, 325 U.S. 398, 89 L.ed. 1692.<sup>54</sup>)

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54. “Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. \* \* \* Our directions that indictments be quashed when negroes, although numerous in the community, were excluded from grand jury lists have been based on

*A fortiori* a litigant cannot complain because there is no class representation on the jury list or jury in proportion to population. He is not entitled to a list made up of all classes, or specified classes, or any class in any given proportion.<sup>55</sup> (*Thiel v. So. Pac. Co.*, above; *Akins v. Texas*, supra;<sup>56</sup> *Virginia v. Rives*, above; *Thomas v. Texas*, above;<sup>57</sup> *Wong Yim v. United States*, 118 F.2d

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the theory that their continual exclusion indicated discrimination and **not the theory that racial groups must be recognized.** *Norris v. Alabama*, 294 U.S. 587, 79 L.ed. 1074; *Hill v. Texas*, 316 U.S. 400, 86 L.ed. 1559, and *Smith v. Texas*, 311 U.S. 128, 85 L.ed. 84, all supra. The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present \* \* \*."

55. State cases to the same effect: *Jackson v. State*, 180 Md. 658, 26 A.2d 815, 816; *State v. Pierre*, 198 La. 619, 3 So. 2d 895, cert. den. 314 U.S. 676, 86 L.ed. 541; *Miera v. Territory*, 13 N.M. 192, 81 P. 586; *Davis v. Arthur*, 139 Ga. 74, 76 S.E. 675; *Washington v. State*, 95 Fla. 289, 116 So. 470, cert. den. 278 U.S. 599, 73 L.ed. 528.

56. See note 54. The Court also said: "Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia v. Rives*, 100 U.S. 313, 322, 323, 25 L.ed. 667, 670, 671; *Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 513. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection."

The number of possible classes which might be, or be claimed to be, a class or classes of which a litigant imagines himself a member equally "stands in the way of evolution" of a concept that every such class is a candidate for discrimination. Compare note 59 below.

57. The Court said, by quotation: "It may be that the jury commissioner did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit juries in this case; still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated."



667 (C.C.A. 9,—cert. den. 313 U.S. 589, 85 L.ed. 1544);<sup>58</sup> *Beckett v. United States*, 84 F.2d 731 (C.C.A. 6).<sup>59</sup>)

Indeed, absence of any given class from the jury list or jury is without significance. It has no tendency to show improper conduct. It does not show the “purpose to discriminate” that must be present (*Akins v. Texas*, above; *Fay v. New York*, 332 U.S. 261, 91 L.ed. (Adv. Op.) 1517, 1530). It will not support an inference that the essential elements of valid complaint are present, i.e., systematic, purposeful, and arbitrary discrimination against members of a class solely because of membership in that class. (*Virginia v. Rives*, above; *Bush v. Kentucky*, above;<sup>60</sup> *Wood v. Brush*, 140 U.S. 278, 35 L.ed. 505; *Jugiro v. Brush*, 140 U.S. 291, 35 L.ed. 510; *Gibson v. Mississippi*,

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58. The rule is violated if “there is a systematic or arbitrary exclusion \* \* \* of a particular race.” But “the mere fact that the juries drawn from the lists represented only certain races, does not show that the list was made to include only two or three races or that it was in any manner discriminatory.”

59. “The appellants wholly failed to produce any substantial evidence to establish a practice to systematic and arbitrary exclusion of negro citizens from the jury service. The proofs affirmatively show that a substantial number of colored citizens of the district were on the jury list. The fact that none were drawn for trial is, of course, not controlling. \* \* \* We know of no statutory or constitutional mandate which requires proportional representation on jury lists of racial, religious, political or occupational groups within the district. Such requirement is not imperative to the drawing of a fair and impartial jury, would make impossible the functioning of the court and nullify the constitutional imperative that commands a speedy trial.” Compare note 56 above.

60. “It might have been true that only white citizens were selected and summoned; yet it would not necessarily follow that the officers had violated the law and the special instructions given by the court ‘to proceed in the selection without regard to race, color or previous condition of servitude.’ ”

above; *Thomas v. Texas*, note 57 above;<sup>61</sup> *Martin v. Texas*, above; *Franklin v. South Carolina*, 218 U.S. 161, 167, 54 L.ed. 980, 984; *Ruthenberg v. United States*, 245 U.S. 480, 62 L.ed. 414; *Akins v. Texas*, notes 54 and 56 above. See *Snowden v. Hughes*, 321 U.S. 1, 9, 88 L.ed. 497, 503.<sup>62</sup>)

Lower Federal court and state cases are to the same effect.<sup>63</sup>

If members of the class to which the challenging party

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61. "It was ruled in *Martin v. Texas*, 200 U.S. 316, 50 L.ed. 497, as in other cases, that discrimination in organizing a grand jury and impanelling a petit jury cannot be established by merely proving that no one of the defendant's race was on either of the juries, \* \* \*."

62. "But a discriminatory purpose is not presumed, *Tarrance v. Florida*, 188 U.S. 519, 520, 47 L.ed. 572, 573, 23 S.Ct. 402, there must be a showing of 'clear and intentional discrimination,' *Gundling v. Chicago*, 177 U.S. 183, 186, 44 L.ed. 725, 728, 20 S.Ct. 633; see *Ah Sin v. Wittman*, 198, U.S. 500, 507, 508, 49 L.ed. 1142, 1145, 1146, 25 S.Ct. 756; *Bailey v. Alabama*, 219 U.S. 219, 231, 55 L.ed. 191, 197, 31 S.Ct. 145. Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face, *Neal v. Delaware*, 103 U.S. 370, 394, 397, 26 L.ed. 567, 573, 574; *Norris v. Alabama*, 294 U.S. 587, 589, 79 L.ed. 1074, 1076, 55 S.Ct. 579; *Pierre v. Louisiana*, 306 U.S. 354, 357, 83, L.ed. 757, 759, 59 S.Ct. 536; *Smith v. Texas*, 311 U.S. 128, 130, 131, 85 L.ed. 84, 86, 87, 61 S.Ct. 164; *Hill v. Texas*, 316 U.S. 400, 404, 86 L.ed. 1559, 1562, 62 S.Ct. 1159. But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. *Virginia v. Rives*, 100 U.S. 313, 322, 323, 25 L.ed. 667, 670, 671; *Martin v. Texas*, 200 U.S. 316, 320, 321, 50 L.ed. 497-499, 26 S.Ct. 338; *Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 514, 29 S.Ct. 393; cf. *Williams v. Mississippi*, 170 U.S. 213, 225, 42 L.ed. 1012, 1016, 18 S.Ct. 583."

63. *Wong Yim v. United States*, note 58 above; *Beckett v. United States*, note 59 above; *Young v. United States*, 242 F. 788 (C.C.A. 4,—cert. den. 245 U.S. 656, 62 L.ed. 533); *State v. Brownfield*, 60 S.C. 509, 38 S.E. 2, aff'd *Brownfield v. South Carolina*, 189 U.S. 426, 47 L.ed. 822; *State v. Ryan*, 141 Kan. 549, 42 P.2d 591, 592, col. 1; *Merriweather v. Commonwealth*, 118 Ky. 870, 82 S.W. 592; *State v. Logan*, 344 Mo. 351, 126 S.W.2d 256.

claims to belong, and which it is claimed was improperly excluded, actually appear on the jury list or jury, this answers the claim of systematic, purposeful and discriminatory exclusion (*Fay v. New York*, above; *Akins v. Texas*, above; *Murray v. Louisiana*, 163 U.S. 101, 41 L.ed. 87; *Thomas v. Texas*, 212 U.S. 278, 53 L.ed. 512; *Beckett v. United States*, note 59 above; *People v. Prior*, above; *Miera v. Territory*, 13 N.M. 192, 81 P. 586).

Jury lists do not produce themselves. Someone must prepare them. Under the Federal statutes, this is a non-delegable duty of the clerk (or his deputy)<sup>64</sup> and the jury commissioner (Jud. Cod. §278, 28 U.S.C.A. §412 and see App. B, pp. 7, 8, note 4). It calls for the exercise of judgment.<sup>65</sup> To perform their duty they necessarily have committed to them a discretion in making selection of names from which to draw (*Glasser v. United States*, 315 U.S. 60, 85, 86 L.ed. 680, 707;<sup>66</sup> *Williams v. Mississippi*, 170

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64. Before the 1917 amendment even a deputy clerk could not act. *Dunn v. U. S.*, 238 F. 506 (C.C.A. 5).

65. They must select "citizens" of proper age, possessed of "natural faculties and of ordinary intelligence and not decrepit," who have a "sufficient knowledge of the English language," (Cal. C.C.P. §198). They must avoid persons "convicted of malfeasance in office or any felony or other high crime" (Cal. C.C.P. 199), take only those "of fair character, and approved integrity, and of sound judgment" (Cal. C.C.P. §205), and should avoid persons having any of the numerous California exemptions (Cal. C.C.P. §200).

66. "Jurors in a federal court are to have the qualifications of those in the highest court in the state, and they are to be selected by the clerk of the court and a jury commissioner. Judicial Code §§275, 276, 28 U.S.C.A. §§411, 412. This duty of selection may not be delegated. And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed the officials charged with choosing Federal jurors may exercise some discretion to the end that competent jurors may be called."

U.S. 213, 42 L.ed. 1012; *Franklin v. South Carolina*, 218 U.S. 161, 168, 54 L.ed. 980, 985;<sup>67</sup> *Akins v. Texas*, supra;<sup>68</sup> *Walker v. United States*, 93 F.2d 383, 391 (C.C.A. 8,—cert. den. 303 U.S. 644, 82 L.ed. 1103, reh. den. 303 U.S. 668, 82 L.ed. 1124);<sup>69</sup> *Wilson v. United States*, 104 F.2d 81 (C.C.A. 5,—cert. den. 308 U.S. 574, 84 L.ed. 481); *Collins v. State*, 234 Ala. 197, 174 So. 296; *Thomas v.*

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67. The statute gave “to the jury commissioners the right to select electors of good moral character, such as they may deem qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions. \* \* \* The statute simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications.”

68. Names for the jury list were selected by the commissioners. “This method of selection leaves a wide range of choice to the commissioners. Its validity, however, has been accepted by this court.”

69. The clerk and commissioner, seeking information, sent out a circular letter saying that the desire was “to obtain for jury service the best men in the community, men of intelligence, unquestioned integrity, and who represent the best interests of the community. We do not want men for this service simply because they have nothing else to do \* \* \*. We want men of business affairs.” There was a claim of improper exclusion of “the wage-earning class and unemployed persons and all persons not ‘men of business affairs.’ ” The Court held the challenge was properly overruled and said: “We think the contention is entirely without merit. This court has held that the exclusion of a certain part of a district is proper and that the court need not give any reason, and certainly there is a presumption that it has exercised a sound discretion in making the order and the burden is on the party who seeks to challenge it as arbitrary.” It was further held that the clerk and the commissioner had not delegated their function; that “the law does not contemplate that they must acquire personal knowledge of or acquaintance with prospective jurors so that they may act on their personal knowledge. The manner of acquiring information is for them to determine. \* \* \* These officers, having discharged their duty in a manner not tainted by any suggestion of evil purpose or fraud, are not subject to criticism.”



*Texas*, supra).<sup>70</sup> This completely disposes of appellant's suggestion that selection of names should be left to some scheme of chance.<sup>71</sup>

Whether the Clerk and Jury Commissioner acted honestly and properly exercised their discretion necessarily presents "a question of fact" (*Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 514). This issue of fact is to be determined by the court of original jurisdiction,—the court for which the jury list is prepared. "All challenges, whether to the array or panel or to individual jurors for cause or favor, shall be tried by the court without the aid of triers" (Jud. Cod. §287, 28 U.S.C.A. §424, App. B, p. 13). The trial court is competent to determine the fact (*Wood v. Brush*, 140 U.S. 278, 285, 35 L.ed. 505, 508 (1891), followed in *Jugiro v. Brush*, 140 U.S. 291, 35 L.ed. 510; *Andrews v. Swartz*, 156 U.S. 272, 39 L.ed. 422 (1895); *Gibson v. Mississippi*, 162 U.S. 565, 584, 40 L.ed. 1075, 1079 (1896); *Pierre v. Louisiana*, 306 U.S. 354, 83 L.ed. 757 (1939); *Akins v. Texas*, below). Its determination is entitled to the same respect as the determination of any other question of fact committed to it. If it finds the fact (a general finding by denial of the challenge is sufficient,—*Akins v. Texas*, below), and that there has been no abuse of discretion by the clerk and the jury commissioner, its finding must be affirmed, if there is any evidence to sup-

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70. The Court quoted from the opinion of the court below to the effect that want of full *pro rata* representation would not be evidence of discrimination and that there was no violation of the Constitution if the jury commissioners "fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in their selection of the jury lists."

71. And the Supreme Court ignored the claim on the earlier appeal in this case. See pp. 14 et seq. above.

port it (*Thomas v. Texas*, above;<sup>72</sup> *Akins v. Texas*, 325 U.S. 398, 89 L.ed. 1692;<sup>73</sup> cf. *Reynolds v. U. S.*, 98 U.S. 145, 156, 25 L.ed. 244, 247; *Ex parte Spies*, 123 U.S. 131, 179, 31 L.ed. 80, 90; *Green v. U. S.*, 19 F.2d 850 (C.C.A. 9);<sup>74</sup> *Robinson v. U. S.*, 144 F.2d 392, 398 (C.C.A. 6);<sup>74</sup>

72. "The only contention was that the Jury Commissioners, in the selection of the grand and petit juries who returned the indictment and tried plaintiff in error, did in fact exclude therefrom negroes or persons of African descent because of their race and color. This was a question of fact; and the ordinary rule is that questions of fact will not be reviewed by this court on writs of error to state courts. \* \* \* As before remarked whether such discrimination was practiced in this case, was a question of fact and the determination of this question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution which cannot be presumed, and which there is no reason to hold on the record before us."

73. "As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, *Norris v. Alabama*, 294 U.S. 587, 589, 590, 79 L.ed. 1074, 1076, 1077, 55 S.Ct. 579; *Smith v. Texas*, 311 U.S. 128, 130, 85 L.ed. 84, 86, 61 S.Ct. 164, we accord in that examination great respect to the conclusions of the state judiciary. *Pierre v. Louisiana*, 306 U.S. 354, 358, 83 L.ed. 757, 760, 59 S.Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process' (citing cases)."

74. These three cases were affirmed on certiorari limited to another question.



*American Tobacco Co. v. U. S.*, 147 F.2d 93, 118 (C.C.A. 6)<sup>74</sup>).<sup>75</sup>

Here the appellant has the burden of showing error—want of any evidentiary support for the determination of the trial court. In the trial court, appellant had the burden of proof of his claim by competent evidence. There are no presumptions to assist him. To the contrary the presumptions are the other way (*Fay v. New York*, 332 U.S. 216, 91 L.ed. (Adv. Op.) 1517, 1530;<sup>76</sup> *Akins v. Texas*, above;<sup>77</sup> *Glasser v. U. S.*, 315 U.S. 60, 87, 86 L.ed. 680, 708;<sup>78</sup> *Lewis v. U. S.*, 279 U.S. 63, 73 L.ed. 615, 619;<sup>79</sup>

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75. The rule in the state courts is the same. *Herndon v. State* 178 Ga. 832, 174 S.E. 597, 601, app. dis. 295 U.S. 441, 79 L.ed. 1530; *State v. Walls*, 211 N.C. 487, 191 S.E. 232, 237, app. dis. and cert. den. 302 U.S. 635, 826 L.ed. 494; *State v. Henderson*, 216 N.C. 99, 3 S.E.2d 357, 361; *Lugo v. State*, 136 Tex. Crim. App. 226, 124 S.W.2d 344; *Hamilton v. State*, 138 Tex. Crim. App. 205, 135 S.W.2d 476, second appeal 141 Tex. Crim. App. 614, 150 S.W.2d 395, cert. den. 314 U.S. 609, 86 L.ed. 490.

76. Mere showing of absence of a class is not enough; “there must be a **clear showing** that its absence was caused by discrimination” and “the burden of proving it purposeful and intentional is on the defendant” [challenger].

77. “The burden is, of course, upon the defendant to establish the discrimination. *Tarrance v. Florida*, 188 U.S. 519, 520, 47 L.ed. 572, 573, 23 S.Ct. 402; *Martin v. Texas*, 200 U.S. 316, 50 L.ed. 497, 26 S.Ct. 338; *Norris v. Alabama*, 294 U.S. 587, 590, 79 L.ed. 1074, 1077, 55 S.Ct. 579. An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses. It cannot be lightly concluded that officers of the courts disregard this accepted standard of justice.”

78. Referring to a stipulation that an affidavit might be accepted as proof: “In the absence of such a stipulation, it is incumbent on the moving party to introduce or to offer, distinct evidence in support of the motion; the formal affidavit alone, even though uncontroverted, is not enough. *Smith v. Mississippi*, 162 U.S. 592, 40 L.ed. 1082; *Tarrance v. Florida*, 188 U.S. 519, 47 L.ed. 572; cf. *Brownfield v. South Carolina*, 189 U.S. 426, 47 L.ed. 882. \* \* \* The failure of petitioners to prove their contention is fatal.”

79. Said that if “the contrary is not expressly shown,” com-

*Neal v. Delaware*, above; *Bush v. Kentucky*, above; *Snowden v. Hughes*, above; *Tarrance v. Florida*, 188 U.S. 519, 520, 47 L.ed. 572, 573; *Brownfield v. So. Carolina*, 189 U.S. 426, 47 L.ed. 882; *Martin v. Texas*, above; *Thomas v. Texas*, above; *Franklin v. So. Carolina*, above).<sup>80</sup> The claim must be supported by evidence *ore tenus*. As the *Glasser Case* points out (note 78) in the absence of a stipulation that it might be used, and there was none, the affidavit of appellant's counsel, even had it been offered and received in evidence, and it was not, is of no weight.<sup>81</sup>

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pliance with the Federal statutes dealing with preparation of jury lists "may be taken as sufficiently established by the presumption of regularity. It is the settled rule that all necessary prerequisites to the validity of official action are presumed to be complied with and that where the contrary is asserted it must be affirmatively shown."

80. The holdings of the lower Federal Courts and State Courts are to the same effect. *Mamaux v. United States*, 264 F. 816, 819 (C.C.A. 6); *Wolf v. United States*, 292 F. 673, 678 (C.C.A. 6); *Hindman v. United States*, 292 F. 679, 682 (C.C.A. 6); *Carroll v. United States*, 16 F.2d 951, 955 (C.C.A. 2,—cert. den. 273 U.S. 763, 71 L.ed. 880); *Needham v. United States*, 73 F.2d 1, 2 (C.C.A. 7,—cert. den. 294 U.S. 705, 79 L.ed. 1241); *Walker v. United States*, note 69 above; *United States v. Brady*, 47 F.Supp. 362, 368, aff'd 133 F.2d 476, 480 (C.C.A. 4,—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727); *State v. Brownfield*, 60 S.C. 509, 39 S.E. 2, aff'd 189 U.S. 426, 47 L.ed. 882; *Haynes v. State*, 71 Fla. 585, 72 So. 180, 182; *State v. Dallao*, 187 La. 392, 175 So. 4, app. dis. and cert. den. 302 U.S. 635 and 636, 82 L.ed. 494 and 495, reh. den. 302 U.S. 776 and 777, 82 L.ed. 601; *State v. Pierre*, 198 La. 619, 3 So.2d 895, cert. den. 314 U.S. 676, 86 L.ed. 541; *Davis v. Arthur*, 139 Ga. 74, 76 S.E. 675.

81. Accord: *Smith v. Mississippi*, 162 U.S. 592, 600, 40 L.ed. 1082, 1085; *Carter v. Texas*, 177 U.S. 442, 447, 44 L.ed. 839, 891; *Tarrance v. Florida*, 188 U.S. 519, 47 L.ed. 572; *Brownfield v. South Carolina*, 189 U.S. 426, 47 L.ed. 882; *Martin v. Texas*, 200 U.S. 316, 50 L.ed. 497 (1906); *Franklin v. South Carolina*, 218 U.S. 161, 167, 54 L.ed. 980, 985; *Mamaux v. United States*, 264 Fed. 816, 819 (C.C.A. 6); *United States v. Brady*, 47 F.Supp. 362, aff'd 133 F.2d 476 (C.C.A. 4,—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727); *Franklin v. State*, 85 Ark. 534, 109 S.W. 298; *Montjoy v. Commonwealth*, 262 Ky. 426, 90 S.W.2d 362.

Taking appellant's brief on its face it is answered by what has been said. The real argument, that proportionate representation is required, is answered at page 21 et seq. above, and by the decision in this case, page 14 et seq. above (cf. opinion of this court on earlier appeal). The brief insists that there must be affirmative inclusion of classes with proportionate representation. It overlooks that the rule is only one against purposeful and discriminatory exclusion of classes.

But appellant's brief cannot be taken at its face. It argues (pp. 31, 32, 34) that there was an arbitrary selection of 50% from the class of executives or managers of firms or presidents or owners of business; that the intention was to get an even balance between capital and labor which does not exist in the general population. The argument is based on a misrepresentation of the record. It disregarded the rule that with a finding of fact the only question is whether there is evidence to support it (see p. 27 above). It does not deal with the whole record fairly. It selects only those portions felt to be favorable, and mutilates the record by disregard of evidence that refers directly to evidence dealt with.

In the first place attempt is made to use an affidavit (App. Br. p. 6). Affidavits cannot be used to support a motion or challenge of the sort made (p. 30 above). Beyond this the record shows that the affidavit was not before the court. It was never offered in evidence (cf. *Meade v. Reynolds*, 120 Cal. 234, 52 P.491). At the only point where reference was made to it appropriate grounds of objection were stated and sustained (167:21; 169:13).<sup>82</sup>

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82. The objection included the point that under the *Glasser* and other cases the affidavit could not be used and the added ob-

The only other showing was the testimony of Mr. Calbreath, the Clerk, and Mr. Mikulich, the Jury Commissioner.<sup>83</sup> This evidence showed:

The areas from which names were selected was enlarged in 1940 to include the general commuting area tributary to San Francisco and again in 1943 when Mr. Calbreath became Clerk (C. 219:17 et seq.; 223:17; M. 200:20). It included the counties of San Francisco, San Mateo, Alameda and Marin. The Commissioner took a few names from southern Contra Costa. About 50% of the names were from San Francisco, some 20% to 25% from Alameda, and the remainder from the other counties. Within each area the attempt made was to get a geographical cross-section and to take an appropriate proportion of the names from each part. Lists of registered voters, city directories for San Francisco and Oakland, and phone directories were used; about 50% of the names came from the lists of voters, a small part from telephone

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jections that the affidavit was hearsay, conclusions and irrelevancies (169:19).

Even where proof can be made by affidavit, the affidavit must meet the same tests of admissibility as evidence *ore tenus* (*Willis v. Lauridson*, 161 Cal. 106, 108, 118 Pac. 530; *Bull v. International Power Co.*, 87 N.J.Eq. 1, 99 A. 111, 114). Mere conclusions and generalities, without statement of evidentiary fact, are insufficient for any purpose (*Willis v. Lauridson*, *supra*; *Bull v. International Power Co.*, *supra*; *Mason v. San-Val etc. Co.*, 1 C.2d 666, 672, 36 P.2d 620; *A. G. Col. Co. v. Superior Court*, 196 Cal. 604, 615, 238 Pac. 926; *Schwartz v. Arata*, 45 C.A. 596, 606, 188 Pac. 313). Hearsay statements are without probative effect when met with objection on that ground (*Bull v. International Power Co.*, *supra*; *A. G. Col. Co. v. Superior Court*, *supra*; *Pandolfo v. United States*, 286 Fed. 8, 20 (C.C.A. 7,—cert. den. 261 U.S. 621, 67 L.ed. 831); *In re Roth*, 3 C.A.2d 226, 233, 235, 39 P.2d 490; *Union etc. Bank v. Kolpenitsky*, 125 N.J.Eq. 125, 4 A.2d 413, 415).

83. In referring to this evidence a "C" preceding the record reference refers to the Clerk's testimony and an "M" to the Commissioners.



directories and the remainder from city directories (C. 155:15-159:10; 214:18; 220:18; M. 160:21-161:18; 164:17-19; 166:4 et seq.; 184:7; 191:2; 195:1; 200:15; 204:1). The names were taken at random, from the top of one list, from the end of the next, from the middle of the third, etc. (C. 156:21; 159:16; 215:3; 224:23; M. 160:21-161:18; 194:17-195:6).

Using their best judgment the attempt was made to get a fair cross-section of this whole community within commuting distance of the court (M. 184:1 et seq.; 191:2; C. 216:22; 218:14; 219:6; 224:19). No class was excluded for any reason whether the class was one defined by race, color, creed, occupation, economic status or otherwise. In this respect a change had been made and included were those working for an hourly or daily wage. The only exclusions were those of people disqualified or exempt as provided in the California statute.<sup>84</sup> No class was excluded. (C. 157:24; 220:3 et seq.; 221:4; M. 201:2-202:15; 170; 221) Indeed, in many instances the business connection of a person whose name was selected was not known. The salary, financial and economic status of the persons selected were not known. No attention was paid to occupation unless it showed exemption or disqualification<sup>84</sup> and except that if one class, e.g., insurance people, was too heavily represented, an adjustment was made so the list would fairly represent all classes (C. 156:25 et seq.; 215:16 et seq.; 218:22; 220:13 et seq.; M. 165:10; 184:20; 193:18; 201:5). There was no attempt to get people of higher intelligence or other than ordinary intelligence and there was no information on this except as occupation showed it (M. 191:21, C. 214:3).

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84. Statutes set out in Appendix B, pp. 14 et seq.

The argument advanced is grounded on a twisting of the testimony of the Clerk on the hearing of June 6, 1946, and a misrepresentation of the testimony of the Jury Commissioner.

On June 6, 1946, Mr. Calbreath testified (158) that he tried to select approximately half of the proposed jurors from the working class, making no distinction between those who worked for a daily wage and those who worked for a weekly or monthly wage. It is asserted that the other 50% was made up "of the executives or managers of firms or presidents or owners of business" (see App. Br., p. 31) but this was not his testimony. His testimony was:

"The other 50% that made up the list were made up of some of the executives or managers of firms or presidents or owners of business; the colored population was taken into consideration; we put some 15 to 20 colored people in the jury box and also put the same number of Chinese into the jury box." (158:8)

In other words 50% were from the working class and the other 50% were from all other classes:

"Q. So that fifty percent in that classification of truck drivers, carpenters, plumbers, longshoremen, people of that general classification that we call working people and their wives made up about half the list?

A. That is correct.

Q. And the other half was made up of everybody else?

A. Yes.

Q. Was that other half restricted to high-salaried executives of corporations?



A. Well, I don't know what a high-salaried executive of a corporation is, but I do put in some vice-presidents of banks. I put them in there—tellers of banks, general managers of plants, owners of small businesses. For instance, I put a tailor, a man who owns a tailoring business, I put him in that class.

Q. And a cleaner and dyer?

A. If he owns a business, I put him in that class.

Q. Neighborhood grocery store?

A. Yes.

Q. Or a meat or grocery concessionaire in a large market?

A. Yes.

Q. You put them in that classification?

A. Yes.” (222:19-223:12)

He did not try to get a group of a particular class or discriminate by excluding any particular class, or by overloading or including any particular class and in this sense endeavored to equalize; if he found he was outweighed by department store clerks or insurance people he balanced by taking carpenters or butchers or other people of that class (221:2).

The Jury Commissioner was asked what percentage of businessmen, executives, managers and owners of business he selected and replied by asking what was meant by executives (167:1-168:24). The term was not thereafter used. He then said that he endeavored to divide between “people who were working for a wage, daily or by the month, laboring people, business people \* \* \* about half the names of **business people** in and the other half those that are working for wages”; trying to get a balance; “50% of employers, businessmen, and so forth, as against

50% of people earning wages, daily or weekly" (171:5-172:4; 174:21). He made it clear that by "business people" he did **not** mean owners, officers of corporations or principal executives of large business concerns. He testified that on the list as a whole there had been an increase of laboring people (188:2), that from 25 to 30% represented manual laborers (174:25-175:8; 183:15) and that by business people he did **not** mean managers and executives; that there were very few executives (205:25); that there were not 50% of managers and executives (207:9; 208:5); **that among business people he included all people who were connected with business**; that business people would include people operating small businesses of their own, such as a storekeeper, a market keeper, a butcher having a concession, department managers, buyers and people of that class, employees of business houses as salesmen and accountants; that he did not intend the expression to mean officers of corporations or executives (203:7-25); that a young lady who was a clerk would be a business person and he would include clerks, stenographers, solicitors, and salesmen (205-206:21):

"Q. I present again that the record is indefinite. Counsel said in the other fifty per cent you put in—and we have been talking here about a fifty per cent and I don't know whether that is this fifty per cent or not, but fifty per cent or half of the people on your list are managers and presidents and officers of corporations, and business people of that type?

A. **No, they are not.**

Q. So, you are talking about business people and you mean people connected with what you would call a business house, an insurance concern or a stationery

or a department store, whatever their occupation or position might be there?

A. Yes, that is my interpretation of business.

Q. That may include some department heads?

A. Yes.

Q. But it would also include a salesgirl?

A. Yes.

Q. Or a stockroom clerk?

A. Yes.

Q. Or salesman or solicitor, people of that type?

A. Yes." (208:5—208:21)

"I am telling you my idea of business people are people that are connected with business. I wouldn't call a hod carrier a business man, but I think a clerk, a salesman, a man connected with a business, any type of business, are business people." (209:7-11)

The case makes apparent the insuperable difficulty of attempting to get classifications for a jury list. This was pointed out in *Fay v. New York*, supra. So long as we are dealing with only two mutually exclusive classes as the black and the white races, there is little difficulty. But there is no agreement on social and economical classification, and the classes are not mutually exclusive. The hired man of a corporation working on a salary may be wealthy, prominent and of enviable social position or he may be just the reverse. The proprietor and chief executive of a business, whether it is large or small may be rich or poor and whether one or the other may be respected or in ill-repute. The owner of a small business (on this jury there was a sign painter who had his own business) socially and economically may be of the same class as a journeyman plumber working for an hourly or a daily wage. A

butcher may be a member of the Armour family, a department head of Swift & Co., the proprietor of the meat concession in the Rex Market on Polk Street or a clerk behind the counter at a Safeway Store. Ministers and teachers are traditionally poor. Gamblers, if we can believe the daily papers and the difficulties of the telephone company, are rich. Negroes and women appear all along the social and economic scale. This need not be enlarged upon. We respectfully refer the Court to Mr. Justice Jackson's opinion in the *Fay Case*.

The problem presented by the inclusion of women is a specific instance of the difficulty. The Clerk indicated he endeavored to select 50% women,—from 40% to 50% (157:14; 211:21). The Jury Commissioner endeavored to get 40% (188:12; 189:1; 190:1; 195:16). The actual percentage of the panel as finally sworn was slightly lower. It is to be compared with 7000 out of 60,000 on the general panel in the *Fay Case* and 30 out of approximately 2911 on the special panel where, in Note 4, citing the *Akins Case*, it was said it was almost frivolous to argue that any bias against women was shown. The opinion (91 L.ed. (Adv. Op.) at 1532) points out that the considerations affecting the inclusion of women are historical as well as logical. A few of the practical considerations are that it is more difficult to determine the occupation and economic status of a woman or of her husband (if not working she is listed merely as housewife) and so to get a proper balance in other classifications. Women whose names are drawn from the box are less likely to present individual claims of exemption or excuses on the ground of hardship. There is a real likelihood that if the names

put into the box are 60% men and 40% women, the panel finally selected may well be 50% of each. But the point need not be over-worked. There is no requirement of proportional representation of women (see p. 22 above). The point was made when this case was before the Supreme Court of the United States and was there ruled against appellant *sub silencio* (see p. 14 above). And see the earlier opinion of this court, 149 F.2d 783.

There is nothing to the point that the names were selected by the Clerk and the Jury Commissioner at random from lists of voters and directories. There is no requirement that the names be selected by some scheme of chance or according to some mathematical formula. Indeed, this would be a violation of the statute.<sup>85</sup> The statute commits the matter to the discretion of the Clerk and the Jury Commissioner (see p. 25). This point was made when this case was before the Supreme Court of the United States and was given silent treatment.

There is nothing to the point that there was no order directing the parts of the district from which the jurors should come. The statute contemplates that they may not come from the whole district and it is no objection because they do not (App. B, p. 9). The practice followed here was one that had been followed consistently. Indeed, it was the practice for 30 years under Mr. Calbreath's predecessor as Clerk and under Mr. Mikulich (see Appellee's Brief in C.C.A. 9 No. 10681 where references are given to the testimony of Mr. Maling and Mr. Mikulich). It was a practice adopted on the instruction of the Court, and certainly received tacit approval of the District Court.

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85. 28 U.S.C. § 412. See Appendix B, p. 7.



But there is something more important. Before the names for this panel were drawn two judges of the District Court, Judges Goodman and Roche, on June 6, 1946, had an open hearing and inquired, among other things, of the parts of the district from which the names had been selected. With that information the Court then made a finding that the names "have been properly selected," and made a formal order for drawing the names. If a formal order was required it was made (161:19). (Cf. *Lewis v. U. S.*, 279 U.S. 63, 73 L.ed. 615.)

Nothing else needs be considered. The burden was on the challenger to make and sustain claims of irregularity. All gaps are filled by the presumption of regularity in the conduct of the Clerk and the Jury Commissioner.<sup>86</sup> There is nothing to meet or overcome this presumption even where testimony was introduced.

Some reference has been made to the 37 talesmen drawn in this case. This can have no bearing on how the Clerk and Commissioner acted (see page 23 above). But the statements made are inaccurate. We summarize the record in Appendix D.

### III

#### THE EVIDENCE SUSTAINS THE VERDICT AND JUDGMENT

##### A. BASIC FACTS.

On the first appeal on the merits, it was claimed the evidence did not support the verdict. This court considered and rejected that claim (C.C.A. 9, No. 10681; 149 F.2d 738, 788). The evidence on the second trial was sub-

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86. See the *Lewis Case*, quoted in note 79 above.



stantially the same, except that in some respects the evidence strengthened the defendant's position.<sup>87</sup> Our statement of the case will follow that in our brief on the earlier appeal with appropriate reference to this record. Appellant's brief, as on the jury question, tells only part of the story. It disregards the rule that the verdict has resolved all conflicts in favor of appellee, disregards inferences favorable to appellee and distorts the evidence by selecting only those parts of it thought to help appellant. This makes it necessary briefly to review the evidence.

Most of the testimony of what occurred before the day of the accident, comes from appellant. He testified, as well, to what happened on the day of the accident up to the time he jumped from the train. In view of the claim of mental abnormality, it is significant that he testified, in some detail, from his own recollection.<sup>88</sup>

### **1. Appellant's Actions Up to the Day of the Accident.**

Appellant, his fiance, whom he had known about 3 months, and his friend, Johnnie Morris, left San Francisco on Saturday, February 17th, 1940, and arrived in

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87. Testimony and evidence by interrogatories and documents was exactly the same of course and the testimony of 4 witnesses, Wilcox, the express messenger, conductor Cosgrove, Dr. Bernard, and Carl Smith, investigator for the California Motor Vehicle Department, was exactly the same because given by reading their testimony of the first trial.

Witnesses who were not called at the first trial were engineer Tassi, called by the plaintiff and the ambulance driver Laity and deputy Sheriff Parks, called by the defendant.

88. He said that in testifying on his deposition in April, 1941, on the first trial in November, 1942 and on this trial he was testifying from his "own memory and not what someone else told" him (483, 484). Compare our brief on the earlier appeal, p. 41, note 85. Dr. Anderson testified that one of the aspects of alcoholic psychosis is loss of memory (647, 657-659). He had no loss of memory.

Reno next morning. The object of the trip was his marriage to his fiancé. They were married in Reno on the 18th (373, 412, 413, 484-494). All three went to the Senator Hotel,<sup>89</sup> about 8 blocks from the Southern Pacific Depot, and stayed there through Friday, the 23rd (414, 485, 494-496).

On Monday, the 19th, appellant quarreled with his wife<sup>90</sup> and started drinking<sup>91</sup> (413, 485, 486, 496, 498). Monday through Thursday he drank and gambled. His drinking was in the hotel room with Morris; they drank about one bottle of bourbon a day, and perhaps had some drinks in a bar<sup>92</sup> (374, 501-504). Possibly by Friday, and certainly by Saturday morning, he had lost all their money—they were all broke (413, 501, 504). He was not sure whether he drank on Friday (504). At any rate, on Saturday they were out of money and left the Senator Hotel with their bill unpaid, leaving their bags (514, 516). On deposition

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89. He did not remember the names of the proprietor or the room number. When asked whether he registered as "George Wendell and wife—Marin County" he said "A. No, it is not—not that I—no."; that if he used another name he was drunk (494, 495).

He, his wife and Morris did not use their right names (769-773). They occupied rooms 338 and 337 (1044) and the names registered for room 338 were "George Wendell and wife, Marin County, California" (771, 772).

90. He said his wife told him she had been married twice before and didn't care for him; that he had known her and her father about 3 months but had not known she had been married; that he had so testified on deposition and on an earlier trial and now so testified (487, 488). Yet the affidavit for marriage license which **he** signed showed she had been married before! (488, 489, 493).

91. **After** he was asked whether he registered at the hotel under a fictitious name (see note 89) he was inclined to move some of the drinking up to Sunday the 18th (495-497). Earlier, on his deposition (498) and on the first trial (500) he said he **started** after the quarrel on Monday.

92. Hardly enough to produce DTs in view of the fact Mrs. Tbiel drank some of the whisky (503).

he testified that on Saturday he had only 10 cents left, put this in a slot machine, got 80 cents, and with this bought whisky<sup>93</sup> (505 et seq.).

Appellant says that on Saturday, the 24th, he was nervous, upset and sick; that he had hallucinations<sup>94</sup> (489, 515); that he was out of money and anxious about getting home (515). Saturday night he and his wife stayed at a different hotel (414, 485, 489).

Appellant had nothing to drink for over 24 hours before he jumped out the train window.<sup>95</sup> The amounts of alcohol he had taken were not excessive; give no foundation for hallucinations that harm threatened.<sup>96</sup> There is nothing to show that he was not fully oriented, that he did not fully appreciate his surroundings, know where he was and what he was doing. He did not try to run away.

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93. On the trial he tried to move this to Sunday morning (505). But the rest of the record makes it clear he drank nothing on Sunday and the date was not corrected on the deposition though other dates were (505-513). See note 95.

In any event it was stipulated that he was sober when he got on the train and he so testified (541, 587).

94. On this trial for the first time appellant enlarged on the claimed Saturday night hallucinations; said that he spent all night on top of a dresser, did not go to bed, did not take his clothes off, threw sticks down a light well, etc. Yet, in the same breath, he says his wife was with him all the time and was unmoved by his antics (516, et seq.). His deposition clearly indicated that he did go to bed (516). He says that he did not change his clothes (489, 490). Evidence of his neat appearance the next day contradicts his story.

95. At one point he said he drank nothing even on Saturday (514) and on his deposition said the slot machine episode may have been on Friday (see 505-513 and note 93). In any event it was stipulated he was not drunk Sunday afternoon and evening.

96. His fears were also for Morris and Mrs. Thiel, he says (415, 433, 439, 557) a subjective symptom said by plaintiff's witness Dr. Anderson **not** to be a symptom of alcoholic psychosis (647, 660). He says he feared for his wife on the train. But he left her alone (557).

## 2. Appellant's Actions on Sunday, Feb. 25, 1940, Until Just Before Train Time.

Appellant says that on Sunday, the 25th, he was nervous, and afraid.<sup>96</sup>

Appellant had nothing to drink on Sunday, the day of the accident (484, 525-530; see notes 93 and 95). He got up about 6 a. m., before sun-up, and left the hotel. Although he claims to have been in fear, before sun-up, he wandered around Reno, alone (418, 489, 525-530). When he left he asked his wife to meet him at the Southern Pacific Depot at 11 o'clock. About 11 o'clock he met her and Morris there. That was the first time he had been there or had any contact with appellee since arrival in Reno (418, 419, 428:1; 489, 522, 525, 526). From the time he arrived at the Southern Pacific Depot until he boarded train No. 9 he stayed in the waiting room, in front of the ticket office, except when all three left for the Western Union office (376, 427, 428, 530).

Before 4 o'clock Mrs. Thiel phoned her mother collect to have money wired. Appellant told his wife what to say (431, 532). All three waited at the station for a reply until about 6 P. M. (427, 428, 530, 545), when they heard the money had been wired, left, and walked to the telegraph office<sup>97</sup> (427, 431, 432, 530, 533). It was then dark (537, 538). From there they walked to the police station and were interviewed (377, 434 et seq., 531), the police saw no reason to detain them and suggested they take their train for San Francisco<sup>98</sup> (1032, 1033, 1035-1041), they walked

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97. Although he says he was afraid and the money was wired to his wife he could not or would not say why he went with them instead of staying at the station (538).

98. There is no claim the railroad knew anything about what happened at the police station. Each of the three was inter-

to the Senator Hotel, paid their bill,<sup>99</sup> got their bags (436, 531, 539), walked back to the railroad station, arriving about 8 o'clock, having stopped to eat on the way (430, 436, 437, 531, 539, 540, 545), and were there till the train arrived (531).

### **3. Appellant's Actions From the Time He Returned to the Depot Until He Went Through the Train Window.**

The railroad station was lighted and there were people in the waiting room (538). Tickets for San Francisco were bought (546). When the train arrived appellant, his wife and Morris got on the head end of the second coach, on the station side, practically in front of the waiting room, went into the second coach and took seats. Appellant got on without assistance (549 et seq., 619). Rippetoe followed immediately behind them. This was the first time Rippetoe noticed appellant. Nothing had attracted his attention to the three people (614, 619, 620). Yet he had been in the depot since about 4:30 (618).

After the train left Reno, appellant, Morris and Rippetoe

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viewed by Detective Sergeant Castlebury and Thiel said he was in danger and was being followed (1029-1031). Thiel did not appear drunk and there was no odor of alcohol (1032). Castlebury, after observing and interviewing them advised them to take their train to San Francisco and said he had no facilities "to guard anyone who apparently didn't need any assistance along that line," and that since he was accompanied by "two normal adults, that he felt that he was in perfect safety" (1033). The Reno police had facilities for caring for people who might harm themselves. When in his judgment there was such a case Castlebury used these (1041). But he never assumed that Thiel should be detained or guarded (1040); he was coherent, knew where he was and looked normal (1037-1039) and no effort was made to detain him and no record or report was made because it was not thought warranted (1035-1036).

99. Although he says he was acting queerly and his wife and Morris knew it, he was given the money received and paid the hotel bill! (539).



went from the second coach to the smoker (370, 453, 552, 556, 557, 560, 611, 614, 623). Appellant and Morris took a seat, Thiel next to the window, and Morris on the aisle. Rippetoe was in the seat ahead (450, 561, 612, 613, 633). There was a trainman in the back of the car (450, 451, 561, 905).

About 20 minutes out of Reno, but still in Nevada, the conductor came through lifting transportation (452, 561, 562, 608, 613, 1074). When he reached Morris and appellant, Morris stood up. According to appellant Morris was standing talking to the conductor (562, 624, 626), and according to the conductor the conductor had passed on a step or two (1077, 1095) when appellant suddenly opened the window and leaped out (454, 562-565, 613-615).

Appellant undertook to testify in detail to what happened in the smoker, how and why he went out the window and what led up to this. But when he was not testifying in his own law suit his statements were different. At Truckee he was helped by Carl E. Smith, an employee of the California Motor Vehicle Department (1053). He told Smith he had been on relief, looking for a position in Reno, was desperate, did not know what to do and that was why he jumped (1054).

William H. Laity drove the ambulance which took Thiel to Reno. It was a converted seven-passenger standard automobile. To get the ambulance couch in it was rebuilt. The right half of the front seat was removed and the couch extended into the automobile so the patient's head was next to the driver (926-928, 936). On the way in Laity and Thiel talked intermittently (931, 934). Laity asked what happened and Thiel said:

“Well, I really don't know.” He said, “There were three of us sitting in front of the coaches, and the



other gentleman and I went forward to the smoker," and he said that, "We were sitting there, and on the spur of the moment I raised the window and jumped," and then he said, "I don't know why I did it." He said, "I don't want to die now. At that time I did." (932:12-18)

Thiel said: "I don't know what came over me. I raised the window and jumped out" and gave no reason at all (935).

Next morning, in the hospital, about 24 hours before he was seen by Dr. Wyman (675, 692), Parks, chief criminal investigator for the District Attorney and Sheriff at Reno (948), after receiving permission from the head nurse, talked to Thiel in the presence of the head nurse (949, 950, 953, 955). Thiel told Parks that "he jumped on the spur of an impulse, and before he reached the ground he was sorry he had jumped" (959).

Months later at the San Francisco Hospital he signed a statement that he was "confused about the details of the accident and at the present time cannot remember exactly how it happened. Patient states he had not been drinking" (569-573).

#### **4. Appellant's Testimony of His Mental Condition and Claimed Notice to Appellee.**

This case presents grave questions of appellant's veracity. He has testified to what he thinks are new helpful details of his Saturday night hallucinations, now disclosed for the first time to anyone (see note 94) to an untruthful statement that he did not know his wife had been married before (see note 90), hesitated and then denied that he registered under a fictitious name (see note 89) and was squarely contradicted repeatedly. We might omit any

reference to his testimony. The jury was entitled to disregard all of it. But this is what he says:

On Sunday he feared he, his wife and Morris would be harmed (see note 96). He complained to others (415, 432). People in the station looked like they were practically all after him (437). Just before he jumped he saw a man ahead in the smoker who appeared to have a knife in his chest (454). On the first trial he said he did not know the train was moving (R. 574). But after his witness, Dr. Anderson, testified that appellant told him he became frightened as the train swung around a curve (R. 635, 636), this pretense was given up, and appellant testified that he went to the smoker and the conductor came through, after the train left Reno (561).<sup>1</sup> On this trial there was no such pretense (561). He further testified:

After he first arrived at the station two ticket sellers were on duty (429). He told one that he was afraid to leave the station, and to call a policeman. He heard Morris asked for a policeman, and say he could not handle appellant<sup>2</sup> (428, 432, 437, 440). Morris made similar statements after return from the telegraph office (439, 440). Appellant asked for a policeman to ride the train, and was told one would be along soon (437, 438).

After the tickets were bought a railroad policeman, in uniform, arrived (438, 546), and appellant asked the officer to ride the train (439-443, 736).

After the train arrived the policeman did not get on the train, so appellant got off, found him, and the police-

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1. See Appellee's Brief in No. 10,681 at page 45.

2. If Morris made such a statement it was untrue. There is no evidence anyone had trouble handling appellant. But appellant's testimony does indicate a consciousness that he had committed himself to Morris's care.

man got on the train and sat near appellant<sup>3</sup> (445, 550, 738-741). Later appellant noticed that the policeman was gone and became frightened (448).

### **5. Further Testimony as to Appellant's Appearance, Conduct, and as to Alleged Conversations.**

Appellant's witness, Dr. Anderson, testified: Patients with delirium tremens have hallucinations; they are anxious, have "a flushed face", perspire profusely, have a course tremor, jerky movements, and rapid pulse; these signs would be quite apparent to lay people (655, 656). (No witness, not even appellant, testified to the presence of any of these signs.) He also said the fears are for self, not others<sup>4</sup> (647, 660).

**Mr. Forsyth** was the ticket agent from 8 a.m. to 4:30 p.m. (794-796). He first noticed appellant and his companions when they came to the ticket window, between 10 a.m. and noon, to have him accept a collect telegram wiring for money. He could not, and suggested that they 'phone collect. They came back from time to time to inquire for a reply (796-798). The party was under his observation until he went off duty (798, 799).

Morris was about 5 feet, 10 inches tall, and weighed at least 160 lbs. The woman was tall for a woman and very heavily built. Appellant was not over 5 feet 6 inches, and slim (796, 797). All were neat in appearance (797). Morris and the woman were sober, coherent and normal (799). Appellant looked like a man who had a hangover. He talked coherently and was oriented. He did not have the "shakes", and appeared normal. He knew where he

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3. Every other witness on the subject contradicted this.

4. See note 96. The reaction is to shield self from harm; it is not the attitude of one seeking harm but exactly the opposite.

was and with whom; he did not stumble or stagger; his face was not flushed; his movements were not jerky; he caused no disturbance or commotion; there was no loud talk or gesticulation. He was not extremely nervous and restless; no more than hundreds of passengers who wait for a train (799-801, 805, 811, 812).

Someone said that appellant had been drinking (810). He learned that appellant was afraid to leave the station but not why (807). Nothing was said about fear of life, nor were inquiries made about police (801). When Mr. Wogan came on duty Mr. Forsyth told him that the party was waiting for money, and that apparently appellant was afraid to leave the station (810).

**Mr. Wogan**, a ticket clerk at Reno for 18 years, was on duty from 4 p.m. until midnight (813). Mr. Forsyth told him that appellant appeared afraid to leave the station (814, 837). The statement lost significance when, later, appellant did leave (821). Mr. Forsyth also told him of the 'phone call for money (814). Mr. Wogan observed the party from time to time. They were well dressed. He talked only to Mrs. Thiel. She inquired about the money and a restaurant (813-817). Later they left the depot (821). There was no other conversation before they left (814-816). They returned about an hour and a half later (816).

Throughout appellant was attended by his two companions (813). Because of what Forsyth had said Mr. Wogan gave them close attention. He saw no basis for the remark. His description of the party corresponded with Mr. Forsyth's (817, 824). Mrs. Thiel and Morris were sober, normal, and under no incapacity (817, 818). Appellant appeared entirely normal (817, 818, 824, 825, 830, 836). He was not demented (842). He did not have the shakes, his face was not flushed, and his movements were neither

irregular nor jerky (821). There was no gesticulating, argument, noise, row or anything of that sort (818, 823). Thiel was nervous, but not more so than normal passengers. He did not look drunk or alcoholic (817, 818, 834). He did not then appear to have a hang-over (834). The party appeared to be in proper condition to be sold tickets (834, 836, 837).

Mr. Wogan had no conversation with either of the men (816, 817, 819). About 8 o'clock he sold Mrs. Thiel 3 coach tickets (816, 819). Although appellant looked normal, in view of what Forsyth had said, he asked Mrs. Thiel, as the best source of information, whether anything was wrong with appellant. She said that he was somewhat nervous, but for no definite reason; that it might be the altitude; that he was disturbed by too many people. She declined to take a drawing room (819, 833, 835). Mr. Wogan flatly denied any such conversations as appellant had testified to that appellant was afraid, or police protection was requested (819, 826). Because of what Mr. Forsyth said, when the railroad policeman came on duty Mr. Wogan asked him to observe appellant (822, 836).

**Mr. Sorenson**, a railroad police officer regularly commissioned by the Governor of Nevada, but paid by Southern Pacific Company, came on duty in uniform and with his badge at about 8:30 p. m. (443, 582, 585, 842-844). He observed appellant and his companions, but had no conversation there with either Mr. or Mrs. Thiel in the station (845, 874). Morris said that Thiel had been drinking heavily lately, was "acting crazy", and that Morris had come to bring him home; that Thiel had tried to run away once; "After I get him on the train then I will be all



right'' (595, 844, 848, 875, 876-886).<sup>5</sup> He observed the party until the train left (849), but had no further conversation, except as noticed below. Appellant looked normal and was not drunk (849, 850, 879, 887, 888, 890, 891). Mr. Sorenson denied that he was asked to ride the train, or was told appellant was afraid or would harm himself, or would not go without protection or that he, Sorenson, said he would go along (845). Mr. Sorenson followed the party to the train, but did not go in the car. Before the train left he got on the car platform and looked in, as he often did, but he did not go in (850, 851, 875).

While Mr. Sorenson was on the station platform, appellant came out, but returned at Mr. Sorenson's suggestion. He did not ask Mr. Sorenson to go with him. Later Morris came along and Mr. Sorenson said that Thiel had stepped out of the car, to which Morris replied that it was all right, "I'll take care of him now" (850, 851, 878). Before the train left Mr. Sorenson told a brakeman that appellant had apparently been drinking, and suggested that he keep an eye on him (892-902).

**Mr. Sherman**, the brakeman, testified that he was not at the car entrance all the time, but that while he was there Morris came out and said to the policeman, "It is all right, I will look out for him", which prompted Sherman to ask what was the matter. The policeman said, "I think he has been drinking" (903-905). Appellant did not look drunk. There was nothing wrong with him that Mr. Sherman saw (906, 918).

**Mr. Cosgrove**,<sup>6</sup> the conductor, first noticed appellant

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5. Thiel claims to have been present at the conversation (735 et seq.). When Sorensen testified plaintiff made some objection but plaintiff himself put in the same matter without limitation by reading an answer to an interrogatory (595).

6. He died before the second trial and his testimony at the first trial was read so it was exactly the same.



when he was collecting the tickets; that till then there was no conversation with appellant or any of his companions (1075, 1076, 1085). He noticed nothing unusual with appellant. He was just sitting quietly in his seat (1078, 1114).

Appellant's witness **Rippetoe** had been at the station since 4:30. He got on the train just behind appellant and his companions. Nothing attracted his attention to them. He sat behind Thiel. He did not notice appellant before he got on the train; there was no loud talk or arguing, and he heard nothing said about appellant not wanting to stay on the train. Thiel did not talk to the conductor. While the policeman got up on the car, he did not come in and sit down as appellant testified (612-615, 619-621, 625, 626). There was nothing unusual in the smoker (633).

Appellant's witness **Buck** was a passenger. He got on at the rear and walked through to the smoker. He saw nothing unusual. His attention was first attracted by the commotion when appellant went through the window (708, 709).

#### **6. Appellant's Condition Was Not in Fact Such as to Require Special Care or Attention From Appellee.**

The claim that appellant was in an abnormal mental condition before he jumped can be supported only by what appellant himself said as a witness and by his testimony of hearsay conversations. And plaintiff's veracity as a witness was open to grave question.<sup>7</sup>

The conversations prove nothing. They were admissible, in an attempt to impute notice, but are no evidence of the

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7. His testimony is inherently inconsistent. It does not square with his own medical evidence (see note 96 above). It is contradicted in almost every particular where others were present and available to contradict it, including his own witnesses. It is contradicted by his own conduct and statements. See note 8 below.

fact. They are untrue. If Morris said appellant was acting crazy, was hard to handle, and had tried to run away, it was untrue. There was no basis in appellant's conduct. The only basis could be what appellant said. Appellant may have said that he was in fear. He had quarreled with his wife. What motive of self-pity, to attract attention or sympathy, he had he does not say. It is a legitimate inference that he was talking for effect.<sup>8</sup>

But there is something more substantial. There was nothing unusual in appellant's appearance. Not even he testified to any abnormality in appearance or action, or any outward symptom of D. T.'s. To anyone who saw him he was normal.<sup>9</sup> There was nothing wrong with his perception or recollection.<sup>10</sup> He described in detail the events of the week in Reno. Although he claims to have been in fear of injury, he wandered around Reno in the dark early on Sunday morning. He had little, if anything, to drink since Friday. His speech was normal, coherent and rational. He claimed to remember conversations. He remembered and recited in detail the events of the day of the accident, and the construction and arrangement of the station (534 et seq.; 795). He knew who he was with, what he was doing and where he was going. He recognized policemen, ticket sellers, the Western Union office, hotels, a police station, a place to eat, etc. He knew he needed

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8. He never explained why he registered at the Senator Hotel under a fictitious name (note 89 above) or how he could have been ignorant of his wife's previous marriage when the fact was stated in his affidavit on application for a marriage license (see note 90 above).

9. Compare the conclusion and conduct of his own witness Castlebury (note 98 above).

10. Want of memory is one of the symptoms of DTs. His Dr. Anderson so testified (647, 657-659). See note 88 above.

money and what to do to get it. There was no loud talking or unruly conduct, gesticulation or commotion. He required no assistance. He moved normally. He knew he was getting on a railroad train, and where it was going. He knew with whom he got on. He got on willingly. He knew tickets must be bought and surrendered. On the train he appreciated where he was, and, after the train left Reno, that it was moving. At all times he was accompanied by two people capable of caring for any need, one of whom, with his acquiescence, had assumed to do so and so stated.

**B. APPELLEE WAS NOT GUILTY OF NEGLIGENCE IN BEING UNABLE TO PREVENT APPELLANT FROM LEAPING FROM THE TRAIN.**

Since the sufficiency of the evidence was argued to this Court and passed upon we will not enlarge on the cases. Most of our cases were cited to the Court on the earlier appeal and were abstracted and quoted for the convenience of the Court, in Appendix H to our Brief. Most of the cases which appellant cites were dealt with in Appendices D and I. This matter is available to the Court and we do not repeat it.

It is argued that appellee owed to appellant the duty of the highest care and is liable for slight negligence. While ordinarily as to **transportation** a common carrier owes that duty, this rule does not apply where the risk realized was injury to the passenger from his own conduct. (*Fagerdahl v. Coast T. Co.*, 178 Wash. 482, 35 P.2d 46.) A passenger's disability, if any, does not change the carrier's duty or increase the **degree** of care required. It is only a circumstance in view of which care is to be used. (See Appendix D of our brief on the earlier appeal, es-

pecially *Alabama etc. R. Co. v. Alseep*, 101 F.2d 157 (C.C.A. 5); *Gulf etc. R. Co. v. Conley*, 113 Tex. 472, 260 S.W. 561, 563.) Under any rule the carrier "is bound to guard only against those occurrences which can be reasonably anticipated," and a "reasonable man \* \* \* will neither neglect what he can foresee as probable, nor waste his anxiety on events that are barely possible." (*Atchison etc. Co. v. Calhoun*, 213 U.S. 1, 9, 53 L.ed. 671, 675; *Kansas City Southern Ry. Co. v. Pinson*, 23 F.2d 247 (C.C.A. 5).)

Nor is there any occasion to discuss intoxication and negligence or contributory negligence. Intoxication does not excuse negligence, nor does it affect defendant's duty, except only where a plaintiff is obviously so intoxicated as to be helpless, and is seen in a dangerous position. This was discussed in Appendix E of our brief on the first appeal.<sup>11</sup> There is no case where intoxication affected the result, except where the injured party was, to the knowledge of the carrier, **incapable of caring for himself**.

Appellee was entitled to judgment as matter of law unless appellant was under a known disability. (See appellant's brief, pp. 61, 62.)

The first essential is the existence **in fact** of the requisite disability. The only disability claimed was mental.

Just any mental incapacity—any deviation from the normal sober person—will **not** do. The evidence must show "need of special attention" and "that the passenger is at the time **incapable of taking care of himself**." (*Welch v. Spokane etc. R. Co.* 91 Wash. 260, 157 P. 679, 681.) The passenger must be "in a helpless condition."

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11. To the cases there cited can be added *Pennix v. Winton*, 61 C.A.2d 761, 143 P.2d 940 (hr. den.); *San Antonio etc. Co. v. Fraser*, 91 S.W.2d 948 (Tex. C.A.); *Bageard v. Consol. Tr. Co.*, 64 N.J.L. 316, 45 A. 620; *Fisher v. W. Va. etc. Co.*, 42 W. Va. 138, 24 S.E. 570.

(*Gates v. Bisso Ferry Co.*, 172 So. 829 (La. App.).) Special attention is required only "under special circumstances" and "the mere fact that a passenger is drinking or under the influence of liquor is not enough"; "intoxication that does not produce helplessness or incapacity" will not do; if the passenger is "merely rendered less capable of protecting himself from accident or injury, than he otherwise would be, or his condition induces him to become more indifferent to his safety, he must take the consequences of his own recklessness," and "his right to recover is no greater than would be that of a sober person." (*Louisville Ry. Co. v. Gregory's Adm'r*, 141 Ky. 747, 133 S.W. 805; *L. & N. R. Co. v. Barnes' Adm'x*, 297 Ky. 616, 180 S.W.2d 547.) This requirement is not confined to drunks; in other cases it must render the passenger "unable to care for himself." (*St. Louis etc. Ry. Co. v. Adams*, 163 S.W. 1029 (Tex. Civ. App.).)<sup>12</sup> The incapacity must have relation to what it is claimed the carrier failed to do. If the loss of a leg requires special care, it does not impose liability for failure to prevent suicide.

At least until appellant went through the window<sup>13</sup> he was not incapable of caring for himself. If there were any

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12. See also *Paris etc. R. Co. v. Robinson*, 104 Tex. 482, 140 S.W. 434; *Louisville etc. Co. v. Mudd's Admr'x*, 173 Ky. 330, 191 S.W. 102; *Dabuey v. R. Co.*, 140 Ill. App. 269 and *R. Co. v. Carr*, 47 Ill. App. 353 quoted in the *Welch Case* above; *L. & N. R. Co. v. Phelps' Admr'x*, 181 Ky. 689, 205 S.W. 793.

13. Even this does not necessarily indicate that at that time appellant was suffering such mental derangement as to require attention from anyone. A deliberate and thoughtful intention to harm one's self is not a disability within the rule we are discussing.

But even if it could be assumed that this act alone was evidence from which an inference could be drawn, it was evidence of a mental condition only at **that** time. It is no evidence of mental attitude at an earlier time. All the other evidence, upon which he relies, indicates that he was in fear of harm, sought



deviation from normal, it was an unfounded fear of harm and a desire to avoid it, with mental capacity to know how; not a mind that invited injury.<sup>14</sup> (Cf. *Chicago etc. Ry. Co. v. Sears*, 210 S.W. 684 (Tex. Com. App.).)

Even if the requisite disability exists, this is not enough. Its existence must be known to the carrier. The carrier has no duty to examine passengers. It can presume they are sane and sober until it has actual knowledge to the contrary. The doctrine of constructive notice has no application. (*Fagerdahl v. North Coast T. Co.*, above;<sup>15</sup> *Watts v. Spokane etc. R. Co.*, 88 Ore. 192, 171 P. 901, 906; *S. P. Co. v. Buntin*, 54 Ariz. 180, 94 P.2d 639;<sup>16</sup> *Paris etc. Co. v. Robinson*, 104 Tex. 482, 140 S.W. 434, 439;<sup>17</sup> *Shipman v.*

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protection from it, and knew what steps to take to get protection from the harm he feared (compare *Chicago etc. Ry. Co. v. Sears*). Moreover, while we have this evidence of his rash acts before us now, as one of appellant's cases, *Dokus v. Palmer*, 130 Conn. 247, 33 A.2d 315, 318, points out "the defendants at the time of the accident had not."

14. If his condition were as claimed by him and appellee knew it, it could reasonably anticipate this and act accordingly. See Dr. Anderson's testimony, p. 49 above.

15. Stating the rule by quotation from *Sullivan v. Seattle Elec. Co.*, 51 Wash. 71, 97 P. 1109, 1112, and *Welsh v. Spokane etc. R. Co.*, 91 Wash. 260, 150 P. 679. The *Sullivan Case*, opinion by Rudkin, J., later Senior Circuit Judge of this Circuit, held an instruction prejudicially erroneous which permitted recovery if the carrier's agents, although they did not know of the disability, should have known of it. In the *Welsh Case* it was said that there was not even a duty of "observation" to ascertain the passenger's condition.

16. "But if the carrier does not know of the abnormality it owes no more care to the abnormal than it would to a normal passenger, and it is under no duty to make an investigation to determine the condition of the passenger."

17. Accord with the cases above that there is no duty of examination or even of observation: *So. P. Ry. Co. v. Hayne*, 209 Ala. 187, 95 So. 879; *Ill. C. R. Co. v. Cruse*, 123 Ky. 463, 96 S.W. 821; *Willeys v. Buffalo etc. R. Co.*, 14 Barb. (N.Y.) 585; *Gulf etc. R. Co. v. Garner*, 115 S.W. 273 (Tex. Civ. App.); *W. & A. R. Co. v. Earwood*, 104 Ga. 127, 29 S.E. 913; *Scott v. U. P. R. Co.*, 99 Neb. 97, 155 N.W. 217.



*United etc. Co.*, 70 R. I. 454, 40 A.2d 730.) If the passenger's condition is revealed only by the accident, there is no liability. (*Welsh v. Spokane etc. R. Co.*, supra; note 13.)

But more, the carrier must have actual notice of the precise kind of disability. If it has notice of one disability it cannot be held for failure to guard for a different disability. (*Fagerdahl v. North Coast T. Co.*, above; *St. Louis etc. Co. v. Adams*, 136 S.W. 1029 (Tex. Civ. App.); *Chic. etc. Ry. Co. v. Sears*, above. Compare *Welsh v. Spokane etc. Co.*, above; *Watts v. Spokane etc. Co.*, 88 Ore. 192, 171 P. 901, 906; *S. P. Co. v. Buntin*, above; *St. Louis etc. R. Co. v. Dobyys*, 54 Okla. 643, 157 P. 735, 738.)

What was appellee's knowledge? There was nothing in appellant's appearance or actions to indicate mental disturbance. Passing from what appellee could observe to what appellant claims was told (whether true or untrue),<sup>18</sup> and assuming knowledge of the railway policeman is ours (a matter not free from doubt, to say the least),<sup>19</sup> it re-

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18. His claims were denied.

19. For notice to an agent to be imputed to the principal the agent must receive it while acting within the scope of his authority and for his principal, it must touch or concern some matter within the scope of his agency, and must be a matter he is under a duty to communicate to his principal. (*Paine v. Trustees*, 7 F. 2d 174, 176; *Missouri etc. Co. v. Belcher*, 88 Tex. 549; 32 S.W. 518, 519.) This rule has been applied to notice of the condition of a passenger. (*Chicago etc. R. Co. v. Sears*, 210 S.W. 684; *Pinson v. So. Ry. Co.*, 85 S.C. 355, 67 S.E. 464, 466.)

Where railroad policemen are appointed under authority of statute, although paid by the railroad company, they are exercising authority conferred upon them by the State, and while pursuing that authority are not agents of the railroad. The Nevada statute and the cases on this general proposition are dealt with in Appendix E. Here railroad police officer Sorenson was appealed to as, and because he was, a **police** officer. He was not appealed to, and was not acting, as an agent of the Southern Pacific Company. He was acting under the authority conferred upon him by the Governor of Nevada. When it was sought to

mains that what was told comes to this: Appellant did not like crowds, feared someone would harm him, was afraid to leave the station (although he did leave it) and wanted protection—not general protection, but protection from gangsters. That appellee was told he had been drinking, was meaningless. He was not then drunk, and did not appear to be. There is no claim appellee was told (1) he would harm himself or had threatened to, or (2) did not want to go on the train. He had not tried to harm himself. His mental attitude was one of avoiding harm. He did want to go on the train. He offered no resistance, and had no attitude of resistance.

There was no one threatening appellant. Appellee knew this. So it comes to this: We are told that appellant wants protection from non-existent harm from non-existent persons. As matter of law or fact, what steps should we have taken to protect him from a non-existent threat of harm? What could we anticipate from a non-existent condition? (Compare the *Sears* and *Adams Cases*.)

We knew nothing which would give rise to a reasonable anticipation that harm would come to appellant. We had no notice of any mental condition such that harm would result, or that appellant was in a position of danger when there was still time to act to prevent injury. Until appellant went out the window he never was in danger. (See note 14, p. 58 above.)

Even when passengers are disabled, from drink or otherwise, and are **unattended**, if not in a position of danger

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introduce evidence of conversations with him this precise objection was made, but was overruled. See particularly the decision of this Court in *Red River Lumber Co. v. Cardenas*, 95 F.2d 157, noticing at 159 that “**the acts of a special policeman are presumed to have been done in his capacity as a public officer.**” To the same effect *Erie R. Co. v. Johnson*, 106 F.2d 550 (C.C.A. 6). See Appendix E.

the carrier need not act against a risk not then present. It need not guard the passenger "to prevent him from injuring himself, or placing himself in a place of danger". (*St. Louis etc. R. Co. v. Carr*, 47 Ill. App. 353; the *Welsh Case* above.) The rule has been applied to a passenger on a bench in a waiting room (*Fagerdahl v. North Coast T. Co.*, above); asleep on a bench on a ferry boat (*Gates v. Bisso Ferry Co.*, above); on a platform of a car stopped on a trestle (*Louisville Ry. v. Gregory's Adm'r*, above); seated in moving railroad cars (*Olson v. Minn. etc. Ry. Co.*, *v. Adams*, 43 N.D. 371, 175 N.W. 371. See also *Sullivan v. Seattle Elec. Co.*, 51 Wash. 71, 97 P. 1109, and *Thixton v. Ill. C. R. Co.*, 29 Ky. 910, 96 S.W. 548).

Where a passenger under a mental disability is with an attendant or companion apparently capable of caring for him, the carrier owes no duty of special attention, and is not liable if the passenger hurts himself. (*Gates v. Bisso Ferry Co.*, above; *Boyd v. Alabama etc. Co.*, 111 Miss. 12, 71 So. 164, and 655; *Olson v. Minn. etc. R. Co.*, above. Cf. *Fagerdahl v. North Coast T. Co.*, above. These cases deal with intoxicated or otherwise mentally incapacitated passengers. Compare: *So. Ry. Co. v. Hayne*, 209 Ala. 186, 95 So. 869; *Arnett v. C. & O. Ry. Co.*, 198 Ky. 742, 248 S.W. 1040; *L. & N. R. Co. v. Dyer*, 152 Ky. 264, 153 S.W. 194.)

Appellee, as to the claim of failing to provide a guard, was entitled to a directed verdict. But, if not, without regard to appellee's evidence, there was a jury question. If appellee's evidence was believed, and it was, there is no liability. The only claim of notice is through the policeman and two ticket sellers. The ticket sellers denied any conversations which could convey notice of any incapacity.

If it cannot be said as matter of law that the policeman was acting only under his commission, in view of the presumption (see note 19, pp. 59, 60) if for no other reasons, the jury could find as a fact that he was appealed to in his official capacity and was acting under state authority and not as our agent.

The jury could and did find that even if we had notice of appellant's condition, there was no breach of duty in the circumstances of **this** case.<sup>20</sup>

But there is a shorter answer. Morris was in the seat with appellant. Rippetoe was immediately ahead. Conductor Cosgrove was a step away. Appellant went so fast that no one could stop him. Another attendant could not have done more. Any failure to provide a guard was not a cause of injury (*St. Louis etc. Ry. Co. v. Adams*, above).

For closely parallel facts see:

*Chicago etc. Ry. Co. v. Sears*, 210 S.W. 684 (Tex. Com'n. App.);

*St. Louis etc. Ry. Co. v. Adams*, 163 S.W. 1029 (Tex. Civ. App.);

*Boyd v. Alabama etc. Co.*, 111 Miss. 12, 71 So. 164 and 655.

With these should be compared:

*Olson v. Minn. etc. R. Co.*, 43 N.D. 371, 175 N.W. 371;

*Gates v. Bisso Ferry Co.*, 172 So. 829 (La. App.);

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20. Appellant makes some reference to a circular and rules put out by appellee (Plf. Ex. 1). (1) The circulars clearly state to what they apply. They apply only to "demented" passengers, or passengers who are incapable of taking care of themselves. (2) Even if they did apply, the question of negligence was still for the jury.

*Fagerdahl v. North Coast T. Co.*, 178 Wash. 482,  
35 P.2d 46;

*Paris etc. R. Co. v. Robinson*, 104 Tex. 482, 140 S.  
W. 434;

*L. & N. R. Co. v. Mudd's Adm'x*, 173 Ky. 330, 191,  
S.W. 102.

In the *Sears* and *Adams Cases* the mental aberration claimed was the same as here,—hallucination of danger from robbers.

No case supports appellant's claim. The farthest any goes is to hold that there was a jury question, and these are distinguishable. The cases above hold that the carrier was entitled to judgment as matter of law. Appellant's cases are reviewed in Appendix I of our brief in No. 10,681.<sup>21</sup>

**C. THERE WAS NO NEGLIGENT DELAY IN STOPPING THE TRAIN  
AFTER APPELLANT WAS OUT THE WINDOW.**

Taking estimates from men admittedly in no position to estimate correctly, and disregarding what actually was done, appellant claims delay in stopping the train.

Rippetoe estimated he was holding appellant, dangling from the window, from 1 to 5 minutes (616) but said that in the circumstances it was very hard to judge time<sup>22</sup> (628). Appellant was kicking, trying to get loose (627, 635). He testified that the conductor said "Let him go"

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21. Additional cases cited are of the same sort,—they hold no more than that there was a question for the jury.

22. On his deposition taken by the plaintiff August 3, 1942 (628) Rippetoe said "You know time. You are not much of a judge of time then," (629); that his best estimate was "Well, something like a minute." (630).



(617). This was denied,<sup>23</sup> but could have no bearing because appellant was not turned loose; he was held until his coat broke and he slipped from it (616, 617).

The conductor testified that after he had passed just beyond appellant and Morris he heard a window open and someone holler (1077, 1078, 1095). He immediately turned, got appellant's collar, and held until the coat tore and appellant fell.<sup>24</sup> Up to that time his whole attention was centered on Thiel (1078, 1080, 1095, 1096, 1098, 1102, 1113). He did not remember Rippetoe having a hold (1078, 1096, 1097). As soon as Thiel fell he gave a stop signal (1080, 1102). He could not say whether anyone else did (1102, 1114), but by the time he signaled the train was stopping (1080, 1099).<sup>24</sup> The time from the time appellant "went through the window" "for said train to come to a stop" he estimated at a minute or less (1101, 1107).

The brakeman, back in the smoker (905), saw the conductor lifting tickets. As the conductor turned the window went up and a man went out. He was grabbed immediately by Morris and the conductor (906, 911). Immediately, appellant still being held, Sherman gave a stop signal (906). The brakes were applied at once (907, 912). Sherman immediately got his lantern and went to the rear platform of the car. As he opened the door someone said "He is gone." He gave a stop signal, a "wash-out" with his lantern (907, 912). There was an attempt to suggest that Sherman was too short to reach the signal cord,

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23. The conductor flatly denied he made any such statement (1113). Clark across the aisle heard no such statement (786). Brakeman Sherman testified that he heard someone say "He is gone" (907).

24. Clark corroborates this (790).



but he pointed out that he had been doing it for 33 years (907).

Sherman is corroborated by Buck. He was at the front of the smoker, reading (702, 706). A commotion in back attracted him, he stood and immediately turned (704, 707, 709). He saw a group and a brakeman with his hand up (704). He thought the brakeman couldn't reach the cord, but "I could not swear to it." He pulled the cord. The brakeman signaled to do it again (704, 705, 707, 708).

Engineer Tassie testified: He was running about 40 miles per hour (717, 722). He received a stop signal and acted at once with the heaviest brake application he could make safely and made the fastest possible stop (711, 712, 717, 718, 720). He stopped in about 1000 feet,—he could not have stopped in 500 feet (712). He paid no attention to whether the signal was repeated (720, 723). They then backed. It was a dangerous move to back into the face of a following train (714-716).

It is fantastic to suppose that in the circumstances any man could estimate time accurately. The time elements are better spoken by what the men did, than by what they say.

Immediately appellant went out the window he was grabbed. His coat tore at once and he fell. The conductor immediately signaled the train to stop. But the signal already had been given by Sherman or Buck, or both, and the engineer had acted.

#### **D. THERE WAS NO NEGLIGENT FAILURE TO RENDER AID.**

On the first trial it was claimed that Dr. Bernard was negligent. On the second trial by stipulation this claim

was abandoned (1013, 1014) and is not now argued. To the contrary a new attempt is made,—an attempt to rely on the California First Aid Kit Law. This is dealt with in dealing with the instructions.

On the eve of trial appellant, over objection, added a new claim,—failure to render aid. Appellee filed written objections and moved to strike (16 et seq.).

The amendment asserted a new and additional cause of action. A ground of objections was that the statute of limitations had run (16 et seq.). Appellee was not required to file a written answer, but by Court order it was deemed that the amendment was “denied and answered” (p. 4, note 12, above).

“Liability for a tort depends upon the law of the place of the injury.” (*Young v. Masci*, 289 U.S. 253, 258, 77 L.ed. 1158, 1161; *W. W. Clyde & Co. v. Dyers*, 126 F.2d 719 (C.C.A. 10,—cert. den. 317 U.S. 638, 87 L.ed. 514; *Loranger v. Nadeau*, 215 Cal. 362, 366, 10 P.2d 63; *Restatement, Conflict of Laws*, §§ 377-388; 3 *Beale, Conflict of Laws*, §§ 378.2, 378.4, 379.1, 383.1, 384.1). Nevada law governs substantive rights and duties. Rules of procedure and the applicable statute of limitations, however, are those of the forum, California. (*Michigan Ins. Bank v. Eldred*, 130 U.S. 693, 32 L.ed. 1080; *Royal Trust Co. v. McBean*, 168 Cal. 642, 646, 144 P. 139; *Restatement, Conflict of Laws*, § 603; 3 *Beale, Conflict of Laws*, § 603.1.) In California actions for personal injury are barred in one year (C.C.P. §§ 335, 340 (3)).

Federal Rules of Civil Procedure, Rule 15(c), providing that an amendment relates back does not apply to a different and additional cause of action. (*L. E. Whitham*

*Const. Co. v. Remur*, 105 F.2d 371 (C.C.A. 10); *Commissioner v. Reick*, 104 F.2d 294 (C.C.A. 3.) Under tests universally applied the allegations added by amendment were the statement of a new and distinct cause of action. (*Phoenix L. Co. v. Houston Water Co.*, 94 Tex. 456, 61 S.W. 707; *McKnight v. Gilzean*, 29 C.A.2d 218, 84 P.2d 213, hr. den.) The new matter does not seek recovery for the same injury as the original claim (*McKnight v. Gilzean*, supra; *Emel v. Standard Oil Co.*, 117 Nev. 418, 220 N.W. 685; *Westover v. Hoover*, 94 Neb. 596, 143 N.W. 946; *Box v. Chicago Ry. Co.*, 107 Iowa 660, 78 N.W. 694). The duty to render first aid, if there is a duty, and certainly a claim of violation of a California statute is separate and in the nature of things could arise only after the original occurrence. (Cf. *Hartmann v. Time, Inc.*, 10 Fed. Rules Service 94 (C.C.A. 3); *Summers v. Dominguez*, 29 C.A.2d 308, 84 P.2d 237; *Restatement, Torts*, § 322, particularly comment D.) A claim of breach of this duty is necessarily distinct. It was barred by the California one-year statute.

Assuming it was not barred, still no negligence was shown. As soon as the train could be backed—i.e., protected against a following train—it was backed to appellant (907, 1080). Sherman got a stretcher from the baggage car, appellant was put in the baggage car (714, 721, 920, 922, 1046, 1081), and rushed to a doctor (721, 1051, 1081, 1083, 1109).

Conductor Cosgrove was the first one to reach appellant (1107). Inquiry was made of the Pullman porter for first aid equipment, usually carried in the Pullman car, but there was none (922, 1107). However, while appellant

had bled, he was not bleeding much (1107, 1109). The conductor fearing infection, did not bandage with sheets from the Pullman car (1107). If he had wasted time looking for string or wrapping it would have taken another 25 to 30 minutes. In that time they got appellant to the doctor (1108). It was the conductor's idea to get him to Truckee as fast as possible (1109).

Mr. Wilcox, the express messenger, made space for appellant in the baggage car. Mr. Wilcox had two banks of steam pipes in the baggage car. One was on. He turned on the other, the double bank. It was hot in the car. Appellant was not bleeding badly. He lost about a pint. All haste was used to get to Truckee (1046-1052; cf. 696). Dr. Bernard attended appellant at Truckee (1063, 1064). Appellant was suffering from shock, and open, dirty wounds (1063). There had been and was very little bleeding. The crushing nature of the injuries had controlled the flow of blood. A tourniquet was not called for. He had not bled enough to affect him (1067, 1068, 692, 693, 1070, 1071). Dr. Bernard and Dr. Wyman both testified that the immediate first aid required, and given by Dr. Bernard, was of such character that it could not have been given, even by a registered nurse (694).

The testimony of Drs. Anderson and Wyman shows that the steps taken for appellant were proper; that the immediate steps were to control bleeding, splint obvious fractures, keep the patient warm and combat shock and get him to a doctor (648-650, 662, 666, 667). A tourniquet only controls bleeding (649, 664, 692). If, as a result of a traumatic wound, bleeding is controlled, a tourniquet is not needed (665, 693). Dr. Bernard, who saw the man, testified

that no tourniquet was necessary. As to splinting, Dr. Anderson testified that 15 minutes would be better spent in getting the man to a doctor than taking time to hunt up a splint and to apply it (666, 667; cf. 695-697), that an open wound with dirt ground in could not be cleaned except by use of instruments, operating room equipment and anesthetic (661, 663, 694) and what should be done is a matter for the person on the scene (669), that if there were any infection, it would have come from the wounds at the time of injury (661, 663) and that if a wound would not come in contact with anything, it would be better to leave it exposed to the air than risk infection by bandaging with material not known to be sterile (664, 694).

The train crew did the only things they should have done. Of first importance was to get appellant to a doctor, and then to a hospital. Proof of the wisdom of the course pursued is that appellant is alive. There is not a word of evidence that any injuries resulted from or were aggravated by what was done for him.

## IV

### OTHER MATTERS SUGGESTED

#### A. CLAIMED ERROR IN DENIAL OF THE MOTION TO PRODUCE.

Granting a motion to produce documents obtained by the adversary in preparation for trial is, at most, discretionary. Nothing has been suggested which would show an abuse of discretion here. This case had been fully tried once. Counsel for the plaintiff knew the defense he would meet. He had had ample opportunity to learn what, if any, proper documents existed. His demand was first made at the pre-trial conference. Full



objection was made that the foundation had not been laid; that there would be no objection to things which were normal matters of record, but objection would be made to an attempt to obtain the defendant's preparation. Plaintiff's attorney then stated that he was "not asking for anything which they obtained by means of investigation or otherwise" (262, 263). Defendant asked that he "designate for us with particularity" what was required "so I can identify them" (263). When, later, the motion was renewed, the documents claimed to exist were specified and identified by affidavit on "information and belief" only. **This was met by an affidavit that there were no such documents** (70). The Court found that this was true (85-93).

#### **B. USE OF INTERROGATORIES.**

Under old Rule 33 interrogatories, if used, were used against the party answering as admissions. The party answering could not use them on this basis. The rule was so obviously unfair that it was amended and is not in effect after March 19, 1948. The plaintiff attempted to take advantage of the old rule by picking and selecting among answers to a large number of interrogatories. He then objected when the defendant attempted to use other answers by the same person **upon the same subject**, which explained what was said in the answers used. The Court, quite properly, permitted this. Under Rule 43 evidence is admissible under a statute of the United States, any rule heretofore applied in the Courts of the United States, or any rule of the Courts of the State in which the trial is held. "In any case, the statute or rule



which favors the reception of the evidence governs." Cal. C. C. P. §1854 provides:

"When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole of the same subject may be inquired into by the other \* \* \* and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence."

The only purpose the defendant had in offering other answers was that truncated and partial statements would not appear, to be argued to the jury, as the written statement of the witness to contradict his statement on the stand. The interrogatories read by the defendant did no more than cover what the witnesses had testified to. Under Rule 61 they could not be ground for reversal even if errors.

But there was no error. The court carefully limited the defendant to reading such answers as fell within the California Code Section. Appellant could not have picked a better example than Interrogatory No. 38. That had to do with the conductor's conduct when plaintiff went out the window. It asked whether the conductor grabbed plaintiff's coat. Physically and logically it fell between interrogatories and answers read by appellant, touching Cosgrove's conduct. These were 36, 39 and 41 which asked whether the conductor did anything to guard the plaintiff before he went through the window and whether the conductor gave an emergency stop signal after he saw plaintiff through the window and when the stop signal was given (602, 603). It certainly was proper to read an intervening interrogatory which showed that between the time plaintiff first

went through the window and the time the conductor gave a stop signal he was trying to hold the plaintiff. (*Reeves v. Ballow*, 16 C.2d 95, 104 P.2d 1017; *Hinton v. Welch*, 179 Cal. 463, 177 D. 282; *Davis v. Forrest*, Fed. Cas. No. 3634; *Wright v. Bragg*, 96 Fed. 729, 733 (C.C.A. 7); *Crawford v. U.S.*, 212 U.S. 183, 198, 53 L.ed. 465, 472.)

#### C. REFUSAL TO PERMIT PHOTOGRAPHS OR VIEWS OF PLAINTIFF'S INJURIES.

Appellant's Brief recognizes that the verdict having been for the defendant on the merits refusing to permit the jury to view plaintiff's injuries or to see pictures of them was not prejudicial (p. 60). Nor was the ruling error. It was a matter for the Court's discretion. (C.C.P. §1954; *Leonard v. Hume*, 5 C.A.2d 41, 41 Pac.2d 965; *People v. Mead*, 47 C.A.2d 91, 117 Pac.2d 424.) Indeed, it has been held error to admit such evidence where, as here, the injuries were not disputed (*Dean v. Seenan*, 42 S. D. 577, 176 N.W. 649).

#### D. CLAIMED ERROR IN THE CHARGE.

The argument of error in the charge shows a number of misconceptions: It overlooks the rule that we were entitled to have instructions given on **our** theory of the facts. (*Thomas v. Visalia etc. Co.*, 169 Cal. 658, 661, 147 P. 972; *Richey v. Watson*, 204 Cal. 387, 268 P. 345.) We and the jury were not bound by plaintiff's theory. His testimony was open to grave question and was contradicted. The jury was not required to believe he had hallucinations. Secondly, the argument forgets that there can be various degrees of not being in one's "normal mind". All deviations do not result in helplessness. Thirdly, the jury could

find various degrees of notice to defendant varying from notice that he was normal, to notice of fear of non-existent threats. Fourth, if there were notice of deviation from normal what to do was a matter of judgment. It is confessed that if plaintiff's conduct is not excused because he could not control it, he clearly was guilty of negligence (see p. 62). Finally, the argument does what the jury was told not to do (963),—it selects a part only of the charge and argues error by wrenching instructions from their context.

At page 61 it is argued that it was error to instruct that if plaintiff was not helpless and incapable of caring for himself, knew where he was, and appreciated his surroundings, he was under a duty to exercise reasonable care and was not relieved of this because he was not in his "normal" mind; that if he were guilty of contributory negligence he would not be relieved of its effects by drunkenness or the effects of excessive drinking.<sup>25</sup> It is said that this puts limits to the conditions under which a demented passenger's failure to use care will not bar recovery. There are such limits, in law and in fact. They depend upon the degree of deviation from normal. Thiel was capable of using some care. The jury was instructed that a person not mentally normal is not held to the degree of care of the ordinary reasonable man, but only to such a degree of care as he can exercise (975:13-16). This was more favorable than appellant was entitled to. The instruction complained of must be read with what immediately follows (996:7-15). It told the jury that if he could not

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25. This does not say intoxication is contributory negligence (it may be—see App. E of our brief in No. 10681) but that if he could exercise care but did not drinking or its effects won't excuse this.

protect himself or appreciate danger to himself, and this were known to us, negligence could not be charged to him and that the defendant, if it knew or should have known his condition, was bound to exercise care commensurate with his ability to guard himself, and to give such care and protection as his condition required commensurate with his ability to guard himself (973:13-974:2).

Appellant's real difficulty is in thinking that the court should have instructed **as matter of law** that plaintiff was **not** guilty of contributory negligence. This was for the jury, and it was proper to deny instructions which would have taken it from the jury. So plaintiff complains of refusal of his request No. 24. This would have told the jury that if he were deranged (in any degree, however slight), and the railroad failed to exercise the highest degree of care (without limiting this to time or claim of negligence<sup>26</sup>) contributory negligence<sup>27</sup> could not be invoked. This is not the rule. Complaint is made of refusal of request No. 35A, that if plaintiff had hallucinations and the defendant knew or in the exercise of reasonable care should have known (this goes beyond the cases, —see p. 58 above) and failed to exercise care, contributory negligence was not available. According to this, if Forsyth failed to exercise care on Sunday morning, plaintiff's later contributory negligence would not be a defense. It must be remembered that the jury was instructed that it was enough to find that defendant was guilty of any **one** act of negligence (971:19-24), and that

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26. This degree of care was certainly not that owed as to first aid. If any care was owed it was only ordinary care.

27. Which could be found only if he were capable of exercising some care.

if there were no negligence in accepting plaintiff as a passenger, but the conductor or brakeman failed to act after plaintiff was out the window, the defendant was “negligent and liable to plaintiff”<sup>28</sup> (971:25-972:11). The court instructed on last clear chance (977:20, et seq.) and specifically applied this doctrine to Sorenson (975:17-976:2), Cosgrove and Sherman (971:25-972:19).

At one with this is complaint (p. 65) of the standard definition of contributory negligence and its effect. It was a complete defense to antecedent or concurrent negligence of the defendant, if any. Subsequent negligence, if any, was covered by the last clear chance instruction.

It is argued (p. 62) that it was error to instruct that payment of Sorenson’s salary by defendant “**without more**” and “if there is **no other** proof” did not make him defendant’s agent; that he was defendant’s agent as matter of law. The instruction was correct (see Appendix E). It was another way of stating that a commissioned police officer is presumed to be acting in his official capacity (see note 19 at p. 60 above). It must be read with that which said that the mere fact that he was commissioned did not preclude his being our agent and that payment of his salary was “some evidence” that he was our agent (977:8-14). Other instructions told the jury that he might be an agent of the defendant and that if he were and were negligent his negligence was defendant’s (975:17 et seq.; 991:5). The instructions were more favorable to plaintiff than he was entitled to, for they said that if defendant had a **right** to direct and control his activity he was its

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28. As to this there was no qualification for plaintiff’s negligence—a verdict was instructed.



agent (977:14-19). This is wrong. We might have the right to direct him in some things but if, at the moment, were not and he was acting as a police officer under his commission remote right to direct would not make him our agent (see Appendix E). If mere payment of salary made Sorenson our agent at all times and in all things the cases in Appendix E and note 19, page 59 above, are wrong, for in all the policeman was paid by the party sought to be charged.

It is argued (p. 63) that it was error to instruct that if plaintiff was not capable of caring for himself but was accompanied "by an attendant who was **competent to adequately** care for him" defendant need not provide another guard etc. The objection stated (1006:12) was not adequate and did not suggest the points now raised. The argument ignores the fact that the instruction applied only where there was an attendant "**competent to adequately** care for" plaintiff. The charge did not overlook that defendant was always under a duty to exercise the highest care. The jury was fully instructed on this (972:25-975:12; 974:6-17; 973:13-974:5; 974:21-975:1). The argument ignores what immediately followed stating that the carrier need not voluntarily offer assistance where the **reasonable anticipation is that assistance from the railroad is unnecessary** but that if special care is promised and the promise is not fulfilled the defendant is not excused because the plaintiff was accompanied (990:20-991:15). Indeed, had the instructions stood alone, it was correct (see cases at page 61 above).

It is argued (p. 64) that if the defendant had constructive knowledge of mental incapacity (degree not



specified) it was required to give special care and that it was error to instruct that there was no increased duty in the absence of actual knowledge **or notice**. The instruction was correct (see cases p. 58 above). It would have been correct if it had turned on knowledge alone. If the plaintiff wanted notice defined he should have requested instructions. Indeed, he did. The instructions were given. The jury was told that if plaintiff were suffering from use of alcohol or mentally ill (degree not stated) and defendant knew "or in the exercise of reasonable care should know" his condition it had to use commensurate care (973:13-974:2); that if defendant "had reasonable notice that plaintiff was mentally ill" it was under a duty to make reasonable inquiry and if it did not it "did not exercise the utmost care and diligence to guard him" (975:2-12). These instructions were much more favorable than necessary. (See cases p. 58 above.)

It is argued (p. 66) that it was error to instruct that if Morris and plaintiff's wife were his agents to look after him their negligence, if any, was his. The instruction was correct. Elsewhere the jury was told that mere concurring negligence of some third person with defendant's was not a defense (976:3-12). There was ample evidence that he had committed himself to the care of his wife and Morris. Direct evidence was not necessary. He says he was present when Morris talked to the ticket seller and the police officer for he testified to the conversation. So he heard Morris say that he had come up to take Thiel home; that in some circumstances he would not be responsible for Thiel (439, 440, 442, 595). He turned the railroad tickets over to Morris and asked him to take care of them (453, 558). Morris, in the smoker, told the conductor that he had

to keep his eye on Thiel (1088). In each instance he acquiesced. That he was looking to his wife to care for him was implicit in his statement that "I don't think she would go without me and leave we there" (538:13). But more important is the whole course of conduct, not only in the station but before arrival there and at the police station where the detective sergeant did not detain Thiel for the **expressed** reason that he was accompanied by two normal adults (1033). It is evident throughout the whole record that Thiel had committed himself to the care of his wife and Morris. Not once did he remonstrate in any of the instances in which he heard statements that care of him had been assumed, nor when it was assumed. Of course, it is not necessary to have a commercial transaction to have an agency (1 Restatement, Agency, §§1, 15, 16, 26). Appellant quotes a case for the proposition that it is presumed a person acts for himself and not for another. But facts overcome the presumption. In undertaking to care for the plaintiff neither his wife nor Morris was acting for himself but for Thiel, and he acquiesced. (Cf. *Johnson v. Gulf etc. Co.*, 2 Tex. Civ. App. 139, 21 S.W. 274, 276, holding noted in *Hines v. Welch*, 229 S.W. 681, 683 (Tex. C.A.); *N. Y. etc. Co. v. Kistler*, 66 Oh. St. 326, 64 N.E. 130, 135.)

The plaintiff complains (p. 67) because the court instructed that the jury was not to draw any inference unfavorable to witnesses or defendant because statements or reports had not been offered by the defendant or received in evidence. The argument overlooks the background and meaning of the instruction. The plaintiff had moved that the defendant be ordered to produce specified reports. The court denied the motion and found

there were no such reports as specified. On cross-examination it developed that statements, undescribed and unidentified as to content had been taken. These were not requested. The only ones referred to were those of people who testified and were cross-examined fully. Then, on argument, utterly without foundation, by using this cross-examination as an excuse, the attorney for plaintiff was guilty of the grossest misconduct in accusing the witnesses and counsel for the defendant of perjury and subordination of perjury (1189-1192). The instruction was given because of this intemperate language. The objection to the instruction was that it dealt with failure to offer the statements in evidence and “there has been **no contention \* \* \*** **that its statements should have been offered** in evidence or were properly admissible”; that the contention was that the statements should have been shown to the witnesses. The objection recognized that the instruction said that the jury might consider that reports were made and had not been shown to the witnesses (1009, 1010). The very objection answers the argument. There is no room to complain of suppression of evidence by the defendant when the evidence would not have been admissible.<sup>29</sup> The instruction says nothing about producing reports or use of them by the plaintiff and had nothing to do with cross-examination or impeachment.

Complaint is made (p. 70) because instructions on the California First Aid Kit Law were refused. The accident happened in Nevada and the California statute had no application (see p. 66 above). The instructions as proposed

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29. They could not have been used even to refresh recollection because no refreshing was needed.

would have made the statute apply without regard for time or place; would have permitted the jury to find that a California statute was violated by conduct in Nevada. They ignored §4 of the statute.<sup>30</sup> There was no attempt to show any of the conditions necessary to show violation of the statute.<sup>31</sup>

### CONCLUSION

It is respectfully submitted that there was no error. The jury panel was properly constructed. Any objection to it was waived. The case was fairly tried and the jury was fully and fairly instructed,—indeed, the instructions resolved every doubtful question of law in favor of the plaintiff and were more favorable to him than the court was required to give.

It is submitted that the judgment must be affirmed.

Dated at San Francisco, California, April 5, 1948.

ARTHUR B. DUNNE,

DUNNE & DUNNE,

*Attorneys for Appellee.*

### (Appendices Follow)

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30. Allows the railroad "not to exceed three days" in which "to replace any package or packages after the use of same has been reported by the employees in charge of said train or steam engine."

31. See note 30 just above.

Moreover, there was no evidence to show that want of a first-aid kit had any causal relation to any injury claimed. The statutory kit was one of bandages only. Bandages have no medicinal properties. They could only serve to keep out further infection and there is no evidence any further infection was or could have been introduced.

## Appendix A

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## Appendix B

## STATUTES DEALING WITH SELECTION OF FEDERAL PETIT JURIES

### FEDERAL STATUTES.<sup>1</sup>

**Judicial Code, §275, 28 U.S.C.A. §411.<sup>2</sup>** (R.S. §800; June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §275, 36 Stat. 1164.) **Jurors; qualifications and exceptions.** Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications,<sup>3</sup> subject to the provisions hereinafter contained, and be entitled to the same exemptions,<sup>3</sup> as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

**Judicial Code, §276, 28 U.S.C.A. §412.<sup>4</sup>** (June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §276, 36 Stat.

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1. We use the wording of the United States Code.

2. This section, with §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44), Judicial Code, §278, 28 U.S.C.A. §415 and Judicial Code §286, 28 U.S.C.A. §423 are the only Federal statutes dealing directly with general qualifications and exemptions of jurors. No Federal statute restricts the power of judges of Federal courts to excuse qualified and non-exempt jurors, in the exercise of their discretion, on a showing personal to the juror not amounting to an exemption. 50 U.S.C.A. §57 deals with employees of U.S. arsenals.

3. The California statutes are set out below.

Only "qualifications" and "exemptions" are determined by state law. "In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But Congress has not made the laws and usages relating to the designation and impaneling of jurors in the state courts applicable to the courts of the United States" except as the statutes of the United States, before 1911, permitted adoption of state practice by rule or order. (*Pointer v. United States*, infra note 4, and note 4; *Ballard v. U. S.*, 329 U.S. 187, 91 L.ed. (Adv. Op.) 195, 197.)

4. The method of obtaining the names has not always been the same. Under R.S. §800 the Federal courts could "by rule or order,



1164; Feb. 3, 1917, c. 27, 39 Stat. 873.) **Same; manner of drawing.** All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified deputy clerk and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political

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conform the designation and impanelling of juries, in substance, to the laws and usages relating to jurors in the State courts." Under the Act of 1879 any judge could order "the names of jurors to be drawn from the boxes used by the State authorities in selecting jurors." (See *Pointer v. United States*, 151 U.S. 396, 406, 38 L.ed. 208, 213 (1894); *Thompson and Merriam, Juries* (1882), §48 et seq.) But even under these provisions the state practice was not followed in the absence of a rule or order of court. "Congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. In the absence of such rule or order \* \* \* the mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed." (*Pointer v. United States*, supra, quoted in *St. Clair v. United States*, 154 U.S. 134, 147, 38 L.ed. 936, 941 (1894); *Apgar v. United States*, 255 F. 16, 18 (C.C.A. 5, 1919,—cert. den. 250 U.S. 642, 63 L.ed. 1185).)

The provisions permitting use of the state practice, or names from the state boxes, were removed in 1911. Since then the only method of getting names has been that of the designated Federal court officials placing names in a Federal jury box. The Federal court officials designated in the statute can not delegate their functions. (*Glasser v. United States*, 315 U.S. 60, 85, 86 L.ed. 680, 707 (1942); *Dunn v. United States*, 238 F. 506 (C.C.A. 5,—1917—holding that before the 1917 amendment the Clerk's deputy could not act for the Clerk).)



party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately without reference to party affiliations<sup>5</sup> until the whole number required shall be placed therein.

**Judicial Code, §277, 28 U.S.C.A. §413.** (R.S. §802; Mar. 3, 1911, c. 231, §277, 36 Stat. 1164.) **Same; apportioned in district.** Jurors shall be returned from such parts of the district,<sup>6</sup> from time to time, as the court shall direct, so as

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5. This reference to political affiliations was introduced by the statute of 1879. This is the first mention in a Federal statute or Federal decision, of party affiliations as a matter for consideration in the selection of names for jury lists.

6. It has been held, repeatedly, that names need not be returned from the whole district. To the contrary, the court may direct that jurors be returned from a part of the district only, under the plain wording of the statute. A jury drawn from names of persons residing in a part only of the district is not subject to challenge on that account. The court can "draw and summon jurors from the entire district" but "it was not necessary, however, that this be done." (*Lewis v. United States*, 279 U.S. 63, 72, 73 L.ed. 615, 619 (1929). Acc., *Agnew v. United States*, 165 U.S. 36, 42, 41 L.ed. 624, 626 (1897); *Ruthenberg v. United States*, 245 U.S. 480, 482, 62 L.ed. 414, 418 (1918); *Jarl v. United States*, 19 F.2d 891, 894, 895 (C.C.A. 8,—1927—citing earlier cases); *Frantz v. United States*, 62 F.2d 737, 738 (C.C.A. 6,—1933—following the *Jarl Case* and citing the *Lewis* and *Ruthenberg Cases*); *Needham v. United States*, 73 F.2d 1, 2 (C.C.A. 7,—1934—cert. den. 294 U.S. 705, 79 L.ed. 1241); *Walker v. United States*, 93 F.2d 383, 392 (C.C.A. 8,—1937—cert. den. 303 U.S. 644, 82 L.ed. 1124); *Seadlund v. United States*, 97 F.2d 742, 747 (C.C.A. 7,—1938); *Walker v. United States*, 116 F.2d 458, 462 (C.C.A. 9,—1940).)

In the *Ruthenberg* and *Seadlund Cases* it was held that the 6th Amendment does not require that the jury be drawn from the whole district and Judicial Code §277 is referred to as indicating that the practice has been otherwise. The *Ruthenberg Cases*, answering the argument that the jurors were not drawn from the entire district, said: "The proposition disregards the plain text of the 6th Amendment, the contemporary construction placed

to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

**28 U.S.C.A. §414** deals with juries in the District of Indiana.

**8 U.S.C.A. §44.<sup>7</sup> (Mar. 1, 1875, c. 114, §4, 18 Stat. 336.)**

**Exclusion of jurors on account of race or color.** No citizen

upon it by the Judiciary Act of 1789 (Chap. 20, 1 Stat. at L. 73, 88, §29) expressly authorizing the drawing of a jury from a part of the district, and the continuous legislative and judicial practice from the beginning. §802, Rev. Stat. §277, Judicial Code [36 Stat. at L. 1164, Chap. 231 Comp. Stat. 1916, §1254]. (Citing earlier cases.)”

7. This is the first Federal statute to deal in terms with exclusion from jury service of any class of person. It was one of the statutes adopted as part of the Congressional scheme of “reconstruction” after the war between the States. It was part of the attempt to secure to the negroes enjoyment of recently acquired civil rights.

On Dec. 18, 1865 the Secretary of State proclaimed the adoption of Amendment XIII. Two companion measures were then introduced in Congress, the Freedman’s Bureau Bill and the Civil Rights Bill of April 9, 1866, c. 31, 14 Stat. 27 (see 8 U.S.C.A. §41. For the later history of §2 of the Act (now Crim. Cod. §20, 18 U.S.C. §52) see *Screws v. U. S.*, 325 U.S. 91, 89 L.ed. 1495). The Civil Rights Bill did not in terms refer to jurors. It did secure to all “the same right \* \* \* to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens.” In *Strauder v. West Virginia*, 100 U.S. 303, 25 L.ed. 664, (1880) a statute confining jurors to “white males” was held to violate Amendment XIV. As part of its argument the opinion quotes the provisions of the Act of 1866 and says they “partially enumerate the rights and immunities intended to be guaranteed by the Constitution.” The clear implication is that the Act was broad enough to strike at discrimination for race or color in selecting names for jury lists. But that case was not decided until 1880.

There were grave doubts as to the constitutionality of the Act of 1866,—whether it was sustained by Amendment XIII. (The question was argued in *Blyew v. United States*, 13 Wall. 581, 20 L.ed. 638, 1872) but the court found it unnecessary to pass on the question.) One of the purposes of Amendment XIV was to remove these doubts. (See *Civil Rights Cases*, 109 U.S. 3, 22, 27 L.ed. 835, 843 (1883); Mr. Justice Field, dissenting in *Ex parte*

possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than \$5,000.00.

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*Virginia*, 100 U.S. 339, L.ed. 676 (1880), and in *San Mateo v. So. Pac. R. Co.*, 13 F. 145, 149 (1882); *Flack, Adoption of the Fourteenth Amendment*, esp. at 40; *Swisher, American Constitutional Development*, 312-316; *McLaughlin, A Constitutional History of the United States*, stud. ed., 653.) Amendment XIV was proclaimed by the Secretary of State on July 28, 1868. The first acts for the enforcement of Amendments XIV and XV were adopted in 1870 and the Civil Rights Bill of April 9, 1866 was "re-enacted with some modifications in sections 16, 17, 18 of the Enforcement Act passed May 31, 1870" c. 114, 16 Stat. 144. (*Civil Rights Cases*, 109 U.S. at 16, 27 L.ed. at 841; *San Mateo v. So. Pac. R. Co.*, supra at 151.)

Charles Sumner was insisting that a supplementary civil rights bill be adopted and on May 13, 1870 introduced a bill which became the Civil Rights Act of Mar. 1, 1875 (*Storey, Charles Sumner* (30 Am. Statesmen Series), 401 et seq.; *Flack, op. cit.*, 218). See Report of Attorney General (1873), p. 17.

The Act of Mar. 1, 1875 was the "culmination of the efforts of Congress to enact laws for the enforcement of the Fourteenth Amendment." (*Flack, op. cit.*, 277) "With this the record of partisan legislation on reconstruction was closed." (*Dunning, Reconstruction* (22 Am. Nation Series), 255.) Section 4 of that act is the statute here set out and is now 8 U.S.C.A. §44. *This is the first Federal Statute to deal in express terms with discrimination in selecting names for jurors.* (It was anticipated in Tennessee in 1868 and in Louisiana in 1870. *Proffatt, Jury Trial*, §116 at p. 163.)

Section 4 of the Act of Mar. 1, 1875, was sustained, as applied to state officers, in *Ex parte Virginia*, 100 U.S. 339, 25 L.ed. 676 (1880). (And see *Neal v. Delaware*, 103 U.S. 370, 385, 26 L.ed. 567, 570 (1881); *Civil Rights Cases*, 109 U.S. 3, 16, 27 L.ed. 835, 841 (1883); *Gibson v. Mississippi*, 162 U.S. 565, 580, 40 L.ed. 1075, 1078 (1896).) But in 1883 §§ 1 and 2 of the Civil Rights Act of Mar. 1, 1875 were held to be beyond the power of Congress (*Civil Rights Cases*, 109 U.S. 3, 27 L.ed. 567 anticipated in

**Judicial Code, §278, 28 U.S.C.A. §415.<sup>8</sup>** (June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §278, 36 Stat. 1165.) **Same; not disqualified because of race or color.** No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous conditions of servitude.

**Judicial Code, §297, 28 U.S.C.A. §416** deals with the issuance and service of writs of venire facias to bring persons into court to serve as jurors.

**Judicial Code, §280, 28 U.S.C.A. §417** deals with returning of "jurymen from the bystanders" where the panel is exhausted without obtaining a jury.

**28 U.S.C.A. §417a** empowers the court to select alternate jurors. This is not required, but is committed to the court's discretion. This section also provides how such jurors shall be impaneled. Compare Fed. Rules of Civ. Pro., Rule 47(b).

**Judicial Code, §§282-285, 28 U.S.C.A. §§419-422** deal with grand jurors.

**Judicial Code, §286, 28 U.S.C.A. §423.** (R.S. §812; June

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*United States v. Harris*, 106 U.S. 629, 27 L.ed. 290 (1883)). This left §4 as the only substantive provision of the Act of Mar. 1, 1875. It now stands alone, torn from its original context. It is easy to forget its background and real purpose. It was part of the Congressional scheme of "reconstruction"; part of an attempt to solve the negro problem. This was its orientation. The primary objective was the problem of the colored citizen rather than the jury system generally.

8. This is only a re-enactment in 1879 of §4 of the Act of Mar. 1, 1875, restricted in application to the Federal courts. Whatever doubts there may have been as to the validity of §4 of the Act of Mar. 1, 1875, until it was sustained in 1880 (see note 7 above), there could be no doubt about a statute restricted in application to the courts of the United States.



30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §286, 36 Stat. 1166.) **Jurors not to serve more than once a year.** No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge.

**Judicial Code, §287, 28 U.S.C.A. §424.** (R.S. §819; Mar. 3, 1911, c. 231, §287, 36 Stat. 1166.) **Challenges.** When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court<sup>9</sup> without the aid of triers.

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9. Appellate courts will give the same deference to the determination of a fact by the trier of facts upon a challenge to the array or to individual jurors, as to any other determination of fact by the court to which that function is committed. (*Akins v. Texas*, 325 U.S. 398, 89 L.ed. 1692, 65 Supp. Ct. Rep. 1279 (1945); *Pierre v. Louisiana*, 306 U.S. 354, 358, 83 L.ed. 757, 760 (1939); *Thomas v. Texas*, 212 U.S. 278, 281, 53 L.ed. 512, 513 (1909); *Gibson v. Mississippi*, 162 U.S. 565, 584, 40 L.ed. 1075, 1079 (1896); *Wood v. Brush*, 140 U.S. 278, 285, 35 L.ed. 505, 508 (1891); *Ex parte Spies*, 123 U.S. 131, 179, 31 L.ed. 80, 90 (1887); *Reynolds v. United States*, 98 U.S. 145, 156, 25 L.ed. 244, 247 (1879); *Press Pub. Co. v. McDonald*, 73 F. 440 (C.C.A. 2,—1896—cert. den. 163 U.S. 700, 41 L.ed. 320); *Robinson v. United States*, 144 F.2d 392, 398 (C.C.A. 6,—

**28 U.S.C.A. §425** deals with peremptory challenges “in the trial of a capital offense.”

**Judicial Code, §288, 28 U.S.C.A. §426** deals with disqualification of jurymen and talesmen “in any prosecution for bigamy, polygamy, or unlawful cohabitation under any statute of the United States.”

#### **CALIFORNIA STATUTES—CODE OF CIVIL PROCEDURE.**

**§198. Persons competent to act as jurors.** A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

2. In possession of his natural faculties and of ordinary intelligence and not decrepit;

3. Possessed of sufficient knowledge of the English language.<sup>10</sup>

**§199. Who not competent to act as juror.** A person is not competent to act as a juror;

1. *Who does not possess the qualifications* prescribed by the preceding section;

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1944—aff'd on certiorari limited to another question, 324 U.S. 282, 89 L.ed. (Adv. Op.) 635 (1945). The determination of the trial court will not be disturbed unless an abuse of discretion is shown. (*Green v. United States*, 19 F.2d 850 (C.C.A. 9,—1927—aff'd on certiorari limited to question of wire tapping, 277 U.S. 438, 72 L.ed. 944); *Robinson v. United States*, supra.) And see *Fay v. New York*, 332 U.S. 261, 91 L.ed. (Adv. Op.) 1517.

The practice in state courts is the same. (*Herndon v. State*, 178 Ga. 832, 174 S.E. 597, 601 (1934) app. dis, 295 U.S. 441, 79 L.ed. 1530 (1935); *State v. Walls*, 211 N.C. 487, 191 S.E. 232, 237 (1937) app. dis. and cert. den. 302 U.S. 635, 82 L.ed. 494 (1937); *State v. Henderson*, 216 N.C. 99, 3 S.E.2d 357, 361 (1939).)

10. A requirement that the person be “assessed on the last assessment-roll \* \* \* on property belonging to him” was in this section until 1915.



2. *Who has been convicted of malfeasance in office or any felony or other high crime; or*

3. *Who has been discharged as a juror by any court of record in this state within a year, as provided in section 200 of this code, or who has been drawn as a grand juror in any such court and served as such within a year and been discharged; or who, in a county or city and county containing a population of not less than three hundred thousand as ascertained by the last preceding census taken under the authority of the congress of the United States, or the legislature of the state of California, during the preceding two years shall have actually served on twenty days as a trial juror in the trial of cases in a court of record in this state; but a juror must in any event complete his service as such juror in the trial of a case in which he may be actually engaged. The clerk shall immediately remove from the jury list the name of any juror who becomes disqualified under this section.*

4. *A person who is serving as a grand juror in any court of record in this state is not competent to act as a trial juror in any such court. Any person who is serving as a trial juror in any court of this state is not competent to act as a grand juror in any such court.*

**§200. Exemptions From Jury Service.** A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, naval or military officer of the United States, or of this State while on active duty;

2. A person holding a county, city and county, city, town or township office of profit;

3. An attorney at law, or the clerk, secretary, or stenographer of an attorney at law;

4. A minister of the gospel, or a priest of any denomination following his profession;

5. A teacher in a university, college, academy or school;

6. A practicing physician, or practicing licensed dentist, practicing chiropodist, or practicing registered optometrist, or druggist, actually engaged in the business of dispensing medicines;

7. An officer, keeper or attendant of an almshouse, hospital, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of the State prison or of a county jail;

9. Employed on board of a vessel navigating the waters of this State;

10. An express agent, mail carrier, or a superintendent, employee, or operator of a telegraph or telephone company, doing a general telegraph or telephone business in this State, or keeper of a public ferry or tollgate;

11. An active member of the National Guard of California,<sup>11</sup> or an active member of a paid fire department of any city and county, city, town or village in this State,<sup>12</sup> or any exempt member<sup>13</sup> of a duly authorized fire company.

12. A superintendent, engineer, fireman, brakeman, motorman, or conductor on a railroad;

13. A person drawn as a juror in any court of record in this State, upon a regular panel, who has served as such within a year, or a person drawn or summoned as a juror

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11. Compare Cal. Mil. and Vet. Cod., §391.

12. Cal. Health and Safety Cod., §14855 also exempts "officers and members of unpaid fire companies regularly organized and exempt firemen."

13. "Every fireman who has served five years in an organized fire company in this State is an 'exempt fireman'." Cal. Health and Safety Cod., §14856.

in any such court, who has been discharged as a juror within a year as hereinafter provided; or a person who is incompetent under Subdivision 3 of the preceding section; provided, however, that in counties having less than 5,000 population the exemption provided by this subdivision shall not apply; or,

14. A practitioner who treats the sick by prayer in the practice of the religion of any well recognized church or denomination, or a reader whose duty is to conduct regular religious services of such church or denomination.

**§205. Selection and listing of jurors.** The selections and listings shall be made of persons<sup>14</sup> suitable and competent to serve as jurors, and in making such selections they shall take the names of such only as are not exempt from serving, who are in the possession of their natural faculties, and not infirm, or decrepit, of fair character and approved integrity, and of sound judgment.

**§602. Challenges of jurors for cause; Grounds of challenge.** Challenges for cause may be taken on one or more of the following grounds:

1. *A want of any of the qualifications prescribed by this code to render a person competent as a juror;*

2. *Consanguinity or affinity within the fourth degree to any party or to an officer of a corporation which is a party;*

3. *Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation*

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14. Until 1915 the names were to be taken from "those assessed on the last preceding assessment-roll."

for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party, or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party.

4. *Having served as a juror in a civil action or been a witness* on a previous trial between the same parties, for the same cause of action; or having served as a juror within one year previously in any civil action or proceeding in which either party was plaintiff or defendant.

5. *Interest on the part of the juror* in the event of the action, or in the main question involved in the action, except his interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

6. *Having an unqualified opinion or belief* as to the merits of the action founded upon knowledge of its material facts or of some of them.

7. *The existence of a state of mind* in the juror evincing enmity against or bias to either party.

8. *That he is a party to an action pending* in the court for which he is drawn and which action is set for trial before the panel of which he is a member.

#### CONSTITUTION OF CALIFORNIA.

**Art. I §4.** “\* \* \* and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; \* \* \*.”

**Art. XX §11.** “Laws shall be made to exclude from office, serving on juries, and from right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office or other high crimes. \* \* \*”

## Appendix C

*In the United States District Court, in and for the  
Northern District of California, Southern Division.*

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Gilbert E. Thiel,

Plaintiff,

vs.

Southern Pacific Co., a corp.,

Defendant.

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No. 21,780

OPINION AND ORDER ON MOTION TO STRIKE  
OUT ENTIRE JURY PANEL, ETC.

Plaintiff has filed herein a notice of motion for an order: “(a) Striking out or quashing the entire jury panel for the ‘July Term, 1946’, which is to be used for trial of this action, now set for September 10, 1946; (b) Directing the Clerk and Jury Commissioner of this Court to select a new panel which will be a fair, democratic cross-section of the community without discrimination in favor or against any one group or class of citizens because of their wealth, occupation, sex or race; and (c) Directing the ‘parts of the district’ of this Court from which ‘jurors shall be returned’ ‘so as to be most favorable to an impartial trial’.”

In support of the motion, movant filed a purported affidavit of Attorney Allen Spivock. This affidavit was not offered or received in evidence. In all events the plaintiff can rely only on the showing made by the evidence ore tenus. It is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion;



the formal affidavit alone, even though uncontroverted, is not enough. *Glasser v. United States*, 315 U.S. 60, 87; 86 L. Ed. 680, 708.

Before taking up the several asserted grounds in support of the motion, and in order to appreciate this more recent attack upon the jury system in this court, the history of the litigation should be given:

On December 30, 1940, plaintiff brought an action against the defendant, Southern Pacific Company, for damages in the sum of \$250,000.00 for injuries resulting from a leap from a train. The complaint in substance and effect alleged that plaintiff was "out of his normal mind" on February 25, 1940; that, before accepting plaintiff as a passenger, defendant was informed that he was "out of his normal mind" and therefore should not be accepted as a passenger or else should be guarded; that defendant, Southern Pacific Company, nevertheless accepted plaintiff as a passenger, left him unguarded and when he leaped failed to stop the train before he fell to the ground; that defendant's conduct constituted alleged negligence and caused plaintiff's alleged injuries.

The action was originally instituted in the Superior Court of the State of California, in and for the City and County of San Francisco. On petition of the defendant it was removed from that court to the District Court of the United States for the Northern District of California. The defendant answered, and in substance and effect denied that plaintiff was "out of his normal mind;" denied that said defendant was informed that plaintiff was "out of his normal mind" and therefore should not be accepted as a passenger, or else should be guarded; and denied that defendant was guilty of any negligence, and affirmatively



alleged that plaintiff's injuries were caused by his own negligence; as a separate defense it was alleged that his injuries were attributable to his own negligence.

Plaintiff filed a written demand for a jury trial in the District Court, and thereafter moved said Court to remand the action to the Superior Court. The motion was denied. Thereafter, disregarding the refusal to remand, plaintiff attempted to prosecute the action in the said Superior Court. Defendant applied for, and after a hearing, obtained from the District Court a judgment enjoining such prosecution. The judgment was affirmed. 126 F.(2d) 710. Certiorari to review the decision was thereafter denied. 316 U.S. 698; 62 S. Ct. 1295.

The action was thereafter assigned to trial in the District Court. A panel of prospective jurors was drawn, and the jury was thereupon and thereafter impaneled. On November 5, 1942, plaintiff challenged the array—the panel of prospective jurors drawn as aforesaid. The challenge was overruled. Thereafter plaintiff amended his complaint alleging in substance and in effect that defendant was negligent in failing to give him first aid treatment and medical attention at the scene. These allegations were denied.

Thereafter plaintiff moved the Court to strike his demand for a jury trial. The motion was denied.

Trial of the action was commenced on November 24, 1942. After the jury was impaneled and sworn plaintiff challenged the twelve jurors comprising it. The challenge was overruled and the trial proceeded. At the close of the evidence plaintiff moved the Court for a directed verdict; the motion was denied. The jury thereafter returned a verdict for the defendant, Southern Pacific Company. Plaintiff thereafter moved for a new trial, and also moved

to take depositions; both of said motions were denied. Judgment was entered for the defendant.

Plaintiff prosecuted his appeal. *Thiel v. Southern Pacific Company*, 149 F.(2d) 783, (Circuit Court of Appeals, Ninth Circuit) and therein specified as error the overruling of his challenge to the array. The challenge was based in substance and effect on practically, if not all, the same grounds urged in the motion before this Court. The judgment was affirmed in its entirety.

On certiorari review was had before the Supreme Court of the United States "*limited to the question of whether petitioner's motion to strike the jury panel was properly denied.*" *Thiel v. Southern Pacific Co.*, 66 S. Ct. 472, 66 S. Ct. 984, 985.

The Supreme Court, speaking through Mr. Justice Murphy, held, in effect, that the intentional exclusion of *daily wage earners* from the jury list required the reversal, regardless of whether the plaintiff was prejudiced by the wrongful exclusion or whether he was one of the excluded class, even though the jury which actually decided the factual issues was found to contain at least five members of the laboring class.

Mr. Justice Frankfurter and Mr. Justice Reed, dissented. The Court said, in part:

"It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship. But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. Here there was no effort, no intention, to determine in advance which individual members of the daily wage earning class would suffer an undue hardship by serving on a jury at the rate of

\$4 a day. All were systematically and automatically excluded." 66 S. Ct. 984, 987.

It was not claimed before the Supreme Court that the District Court Judges for the Northern District of California, with the approval of the Circuit Court Judges, designed racial, religious, social, or economic discrimination to influence the makeup of jury panels, or that such unfair influence infused the selection of the panel, or was reflected in those who were chosen as jurors. Nor was there any suggestion that the method of selecting the jury was an innovation. The challenge went to a practice adopted in order to deal with the special hardship which jury service entailed for workers paid by the day. What was challenged, in short, was not a covert attempt to benefit the propertied but a practice designed, wisely or unwisely, to relieve the economically least secure from the financial burden which jury service involves under existing circumstances. 66 S. Ct. 984, 988.

Several other grounds raised and presented by petitioner (plaintiff herein) were in substance and effect identical with those presently urged. They were given no mention in any of the Justices' opinions.

With that historical background of the case established, it is now proper to refer to the more recent events.

On Thursday, June 6, 1946, in the District Court of the United States for the Northern District of California, Southern Division, before Hon. Louis E. Goodman and Hon. Michael J. Roche, the matter of the selection of master trial and grand jury panels for July, 1946 Term of Court came on regularly to be heard at the hour of 4 o'clock P. M., in compliance with Section 276, as amended, of the Judicial Code (28 U.S.C.A. 412). At that

time the Court announced that it was deemed advisable to hold a session so that there could be a *public* drawing of the jurors.

The hearing was duly noticed in "The Recorder" of Thursday morning, June 6, 1946. The "Recorder" is a newspaper of general circulation and the official organ of the court. Carl W. Galbreath, Clerk of the Court, and William C. Mikulich, the Jury Commissioner, were called to testify with respect to the manner of drawing the jurors. The Clerk testified in substance: That he and the Jury Commissioner, collaborated in the selection of the names that were placed in the box; that the box contained 484 names; that the sources were three—the list of registered voters of the Counties of San Francisco, San Mateo, Alameda and Marin; the city directories of San Francisco and Oakland; and the telephone directories of other cities in the counties named. That he went to the Deputy Registrar of Voters of San Francisco and obtained a list for the year 1943, thence to the County Clerk in Oakland and obtained a complete list of the Alameda County registered voters down as far as Hayward for the year 1944; thence to Redwood City and obtained a list of registered voters for San Mateo County as far south as Redwood City and this side of the range of mountains; also that a list of the registered voters of Marin County was obtained; that approximately 50% of the names placed in the box were secured from the lists of registered voters; and that the remaining 50% were derived from the city directories of San Francisco and Oakland, and the telephone directories of cities in the other counties named.

After satisfying the Court that the sources of the names were such as "to be most favorable to an impartial trial,

and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service," (28 U.S.C.A. 413) Judge Louis E. Goodman then continued the interrogation of the Clerk.

"Q. How did you determine whether or not a person whose name was to be picked might be ineligible for jury duty under the provisions of the law?

A. I would have to depend on the description given in the directory or the list of the registered voters of the occupation of the person I selected.

Q. As between men and women did you use any method of procedure to secure any particular number of men as against women jurors?

A. I endeavored to obtain fifty per cent men and fifty per cent women.

Q. Did you leave out of the jury box the name of any juror whom you had selected because of any special occupation that he might have had aside from these occupations that are made exempt under the law?

A. No, I did not.

Q. Was any person left out because of color or race or creed or occupation?

A. They were not.

Q. What method did you follow in order to secure a cross section selection of jurors as regards occupation or status or color or the like?

A. I endeavored each time to select approximately half of the proposed jurors from the working class; by that I mean I made no distinction between those working for a daily wage as against those who worked for a weekly or monthly wage. That applies to women as well as men. The other fifty per cent that made up the list were made up of some of the executives or managers of firms or presidents or owners of busi-



ness; the colored population was taken into consideration; we put from 15 to 20 colored people in the jury box and also put the same number of Chinese into the jury box.

Q. Have you any way of knowing or did you keep any record as to the percentage of names deposited in the jury box that are residents of San Francisco as against the other counties in this district?

A. Yes, approximately one half of the names I selected are residents of San Francisco, one quarter are residents of Alameda County and one quarter are residents of the counties of Marin and San Mateo.

Q. Were there any names remaining in the box at the time that you deposited the names of the prospective jurors that you have referred to?

A. Yes; there was always an average of about one hundred such names remaining in the box when we filled it.

Q. So that when you filled the jury box this time you put in approximately 380 odd names; is that correct?

A. That is correct.

Q. And of those you put in approximately one half and Commissioner Mikolich put in the other half; is that correct?

A. That is correct.

Q. When you selected names in San Francisco from the list of registered voters did you follow any plan or method with respect to selecting jurors from different assembly districts?

A. I tried to pick a proportionate number of persons from each of the assembly districts in San Francisco.

Q. And did you make any use of the precinct lists?



A. I did. I took the precinct list from each assembly district, and, as I said, I started at the top and went down and found the name of a person that was not exempt and then I went on further and took another one, and then took another precinct list in the same district and did the same thing.

Q. After you had selected the names from the various sources that you have mentioned, did you make any check to see whether or not any of the names that you had picked was ineligible because of recent service as grand or petit jurors?

A. I did.

Q. Or those who had been previously excused because of physical condition or age?

A. I did. I checked the list with the names remaining in the box; with the names on the present trial and grand jury; with the names of persons who had served previously and been discharged, and then with those who had been excused previously on account of age, sickness or physical reasons.

Q. In placing the names in the box did you and the Jury Commissioner place them in alternately?

A. We did."

Thereafter the Jury Commissioner, Mr. Mikulich, was interrogated and stated in substance and effect that the procedure he adopted was identical in all respects with that of the Clerk.

The Court thereafter made the following finding:

"The court finds that the names of the four hundred and eighty four prospective jurors for the July, 1946, term of court, have been properly selected by the Clerk and the Jury Commissioner, as provided by Section 276 of the Judicial Code, as amended."

The testimony elicited from the Clerk has been set forth at some length for the reason that it demonstrates a careful compliance with the views of the Supreme Court in connection with the avoidance of any distinction "*between those working for a daily wage as against those who work for a weekly or monthly wage;*" and, in addition, is demonstrative that the Statutes, 28 U.S.C.A., Sec. 412, et seq. were fully complied with.

With that factual background established, the motion heard on August 19, 1946, before this Court may be analyzed: Plaintiff asserted the following grounds in substance: (1) That the majority of those selected for the jury were business men, etc., and that a small majority of those selected were working men; (2) that a large proportion of the men jurors were selected as compared with women jurors; (3) that no court orders or directions had been given to the Jury Commissioner or the Clerk of Court directing "the parts of the District from which the jurors shall be returned;" (4) that uniform rules were not made for the guidance of the Clerk and Commissioner in the drawing of the said jurors; (5) that no substantial changes in the method of selecting the jurors had been made and that the said decision of the Supreme Court had not been complied with; (6) that a large majority of the persons selected were prejudiced in favor of the defendant Company; (7) that the Jury Commissioner and said Clerk have endeavored to obtain jurors of the highest or superior intelligence and not those of "ordinary intelligence"; (8) that no system of lot or chance was used in selecting said jurors.

On the hearing of this motion the proceedings of June 6, 1946, referred to, were made a part of and read into the

record. Counsel for plaintiff claimed that he did not receive notice of said proceedings.

Notice was not necessary and the hearing was "public" within the contemplation of the statute. 28 U.S.C.A. 412; (Judicial Code, Section 276, amended) *Hammerschmidt v. U. S.*, 287 Fed. 817; *U. S. v. Lewis*, 192 Fed. 633.

The plaintiff then called the Clerk and also the Jury Commissioner, subjecting them to lengthy examination. In substantial particulars their testimony was in consonance with the former testimony on the proceedings of June 6, 1946.

It would seem unnecessary to dilate upon, or otherwise give particular attention to, the several grounds urged, for they are in the main unsubstantial and fully answered by the Federal Statutes applicable: 28 U.S.C.A. 411, 412, et seq.

It is evident from a reading of the transcript of the foregoing proceedings, and from the excerpt hereinabove set forth, that strict compliance was given to the decision, mandate and direction of the Supreme Court, i. e.—*that daily wage earners be included in the panel.*

However, I will discuss plaintiff's points, seriatim:

(1 and 2) Both the Clerk and the Jury Commissioner emphasized in their testimony that the daily wage earners had not been excluded. On the contrary appropriate provision was made for this group.

Mr. Mikulich, the Jury Commissioner, in interpreting the groups classified under business, as compared with labor, detailed that the former included those connected with business as department heads, clerks, salesmen and solicitors, and their wives. In short, the business group representing approximately 50% of the panel did not comprise all proprietors, managers and officials.

Mr. Calbreath, the Clerk of the Court, in his examination was very clear to point out that he sought to *equalize occupations*. Admittedly, he did not go to the San Francisco Chamber of Commerce for information, and this was not incumbent upon him. Plaintiff attempted in Exhibit No. 1 (Economic Survey, San Francisco Bay Area, 1945) to demonstrate that 11.14% of the population represented proprietors, managers and officials, and therefore it was argued that the total number of jurors drawn or "selected" from said group was disproportionate. Counsel for plaintiff has misconceived or misinterpreted the figures. According to the survey it appears: "San Francisco ranks high among large cities with nearly 55% of its entire resident population in the labor force." The other 45% necessarily represented proprietors, managers, officials, clerical, sales, kindred workers and others not identified with the laboring groups.

Although the Clerk and the Commissioner testified that this statistical data was not available to them when the names were selected for the panel, nevertheless the evidence demonstrates that the names as drawn by them represented an impartial panel from a cross-section of the community. The Clerk testified: "*I endeavored each time to select approximately half of the proposed jurors from the working class; by that I mean I made no distinction between those working for a daily wage as against those who worked for a weekly or monthly wage.*"

Plaintiff is laboring under a serious misconception in declaring that "in the Superior Court of the State of California, whose jury qualifications control here, an equal percentage of men and women are now selected." Citing *Pointer v. United States*, 151 U.S. 396, 405-409, 14 S. Ct.

410, 38 L. Ed. 208; *United States v. Roemig*, 52 F. Supp. 857.

The *Pointer* case is not authority for the proposition that the United States District Courts are controlled by the procedure, rules or practices of the State courts. It is only in connection with the *qualifications* and *exemptions* of jurors to serve in the courts of the United States that the statutes of the State are at all applicable. The Court therein said:

“There is nothing in these provisions sustaining the objection made to the mode in which the trial jury was formed. In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. *U. S. v. Shackelford*, 18 How. 588; *U. S. v. Richardson*, 28 Fed. 61, 69. In the absence of such a rule or order (and no such rule or order appears to have been made by the court below), the mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions congress has prescribed, and also to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses.” (151 U.S. 396, 14 S. Ct. 410 at 414.)

In *Albizu v. United States*, 88 Fed.(2d) 138, 140, the Court said:

“As to the assignment of errors relating to the selection of the Jury, there is only one act of con-



gress relating to the drawing of jurors in the federal courts which requires that the persons who are summoned as jurors must be drawn publicly from a box containing at least 300 names. Other than this, unless a federal court shall, by order, adopt the state practice, the method of selection is within the control of the federal courts, subject to any limitation placed thereon by congress, or recognized by the settled principles of criminal law essential to securing an impartial jury. *Pointer v. United States*, 151 U.S. 396, 405-509, 14 S. Ct. 410, 38 L. Ed. 208."

The District Courts for the Northern District of California have not, by rule or order, adopted the State practice in this connection.

Reference is made by the moving party to *United States v. Roemig*, 52 F. Supp. 857. The specification of invalidity therein made was that women were intentionally and systematically excluded from membership on a grand jury. The Court, although acknowledging that "nothing in the Constitution or Statutes of the United States peremptorily requires the inclusion of women on jury lists in the federal courts or forbids their exclusion," granted the motion to quash the indictment after a review of the authorities including *dictum* in *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, and *contra*, *United States v. Ballard* (D.C.S.D. Cal.) 35 F. Supp. 105; affirmed 152 Fed. (2d) 941, (9th Circuit); certiorari granted 66 S. Ct. 816.

The rule announced in the *Roemig* case was simply to the effect that a grand jury on which women were systematically and intentionally prevented from serving by manner of selecting members was invalidly constituted.

There is no rule, statute or decision requiring that the jury list or panel be composed or constituted of 50% women and 50% men.



It appears from the testimony of both the Clerk and the Commissioner herein that they “endeavored to obtain 50% men and 50% women.”

Many prospective women jurors after their names are drawn submit adequate reasons for their excusal by the District Judge, which necessarily involves an exercise of judicial discretion. This latter procedure obviously is not integrated with the drawing of the jurors in the first instance by the Clerk and the Commissioner. The fact that ultimately there were more men than women on the panel is immaterial.

(3) Ground 3 turns on the construction of Judicial Code, section 277 (28 U.S.C.A. 413). The statute is explicit. “Jurors shall be returned from such parts of the district \* \* \* as the Court shall direct \* \* \* so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the District.”

It is contended that “no court orders or directions had been given to the Jury Commissioner or the Clerk directing the parts of the district from which the jurors shall be returned.” The Judges were not required to prescribe such directions or orders and no apportionment was required. It is discretionary with the Court to give or not, at its pleasure, any direction as to the summoning a jury from a part of a district. The Court can “draw and summon jurors from the entire district” but “it was not necessary, however, that this be done.” *Lewis v. United States*, 279 U.S. 63, 72, 73 L. Ed. 615, 619; *Agnew v. United States*, 165 U.S. 36, 42, 41 L. Ed. 624, 626; *Ruthenberg v. United States*, 245 U.S. 480, 482, 62 L. Ed. 414, 418.

Selection of jurors to sit in San Francisco was limited to those within convenient travel distance. It appeared

that it was the rule and practice of the court, going back to 1912, to restrict names put in the jury box to those of people who lived within commuting distance of the court, but within that area, there was no discrimination against any locality.

That practice was maintained and approved under the *direction* of the Court at the hearing "In re selection of Master Trial and Grand Jury Venire on June 6, 1946, for the July 1946 Term of Court," before District Judges Louis E. Goodman and Michael J. Roche.

(4) The Judges of the District Court were not required to prescribe rules for the guidance of the Clerk and Commissioner. Congress has promulgated the rules and the statutes are clear and explicit. 28 U.S.C.A., Sec. 411, 412, et seq. The machinery for putting names into a jury box which shall contain not less than 300 names from which the panel shall be drawn by lot, has been directly prescribed by Congress. The names are to be placed in a box by the Clerk of the District Court, and a Commissioner to be appointed by the Senior District Judge. 28 U.S.C.A., Sec. 412.

Under the Federal statutes the preparation of the jury list is a non-delegable duty of the Clerk (or his deputy) and the Jury Commissioner. This duty calls for the exercise of judgment. They necessarily have committed to them a discretion in making selection of names from which to draw. In *Glasser v. United States*, 315 U.S. 60, 85; 86 L. Ed. 680, 707, the Court said:

"Jurors in a federal court are to have the qualifications of those in the highest court in the state, and they are to be selected by the clerk of the court and a jury commissioner. Judicial Code, Secs. 275, 276, 28 U.S.C.A., Secs. 411, 412. This duty of selection may not be delegated."

All that is called for on their part is an honest and unbiased effort to obtain a jury list from which no class has been purposefully and systematically excluded because of class prejudice.

In the instant case the Clerk and Jury Commissioner discharged their statutory functions impartially, according to law and in the exercise of a sound discretion.

(5) The contention that the "decision of the Supreme Court had not been complied with" is entirely without merit. The testimony of the Clerk and Jury Commissioner is clear and convincing that the jurors were impartially selected and drawn and represented a cross-section of the community. Further, that there was no systematic or intentional exclusion of any group, particularly those engaged in working for a daily wage. *Thiel v. Southern Pacific Co.*, 66 S. Ct. 984, 986.

(6) The asserted ground that a "majority of the persons selected were prejudiced in favor of the defendant Company" is equally without merit. There is no evidence that the persons whose names were selected and placed in the box by the Clerk and Jury Commissioner, were biased or otherwise prejudiced.

Counsel for the movant cannot supply evidence by the mere assertion of reckless charges and unfounded supposition. The burden of proof rests upon him and must be supported by competent evidence. It is the settled rule that all necessary prerequisites to the validity of official action are presumed to be complied with and where the contrary is asserted it must be affirmatively shown. *Lewis v. United States*, 279 U.S. 63, 73 L. Ed. 615, 619.

(7) There is no evidence before this Court that the Jury Commissioner and Clerk sought "jurors of the highest or

superior intelligence and not those of 'ordinary intelligence'."

It appears that these officials acted honestly, impartially and without bias in processing and selecting the names which eventuated in the jury list; in so doing they were guided by the statutes, Federal and State, as applicable, under the direction of the District Court.

Jury lists are not conceived out of thin air. The non-delegable duty of preparing them rests with the Clerk and Commissioner. The evidence adduced at the hearing before this Court points unerringly to a painstaking effort on their part to discharge their official obligation.

An allegation of discriminatory practice in selecting a jury panel challenges an essential element of proper judicial procedure—the requirement of *fairness* on the part of the judicial arm of the Government. It cannot be lightly concluded that officers of the courts disregard this accepted standard of justice. *Akins v. Texas*, 325 U.S. 398; 65 S. Ct. Rep. 1276, 1278, 1279.

(8) Specification or ground 8 is answered by reference to the statutes alluded to. Congress has outlined a specific procedure which was carried out in the selection and drawing of the jury panel under attack.

For the foregoing reasons, it is hereby ORDERED that: Plaintiff's motion to strike and quash the entire jury panel for the July, 1946 Term; for an order directing the Clerk and Jury Commissioner to select a new panel; for an order directing the parts of the District from which jurors shall be returned, be, and the same is hereby denied.

Dated: August 28, 1946.

GEORGE B. HARRIS  
*United States District Judge.*

## APPENDIX D

## JURY EMPANELMENT

We outline here the information obtained about the 37 talesmen called when the jury was empanelled.

Twelve jurors and an alternate were empanelled. Of the 12 8 were men and 4 were women. The alternate was a woman. During the trial two of the 12 became sick and were excused. They were

**Albert N. Wilmes** (273, 319, 725, 726), sign painter operating his own business.

**Zola Taylor** (343, 725, 726), bookkeeper, American Trust Co.

The 4 women who served throughout and were among the 11 who returned the verdict were:

**Mrs. Mary A. Stewart** (273, 280, 281), occupation not disclosed.

**Miss Bessie P. Walthall** (273, 317), occupation not disclosed.

**Mrs. Julie Mescovich** (358), wife of a restaurant keeper.

**Mrs. Lei Troupe** (365), occupation not disclosed.

The seven men who served through and were among the 11 who returned the verdict were:

**Elmo J. Martinez** (273, 335), shipping clerk, American Chicle Co.

**D. P. Surber** (314, 342), U. S. Army retired.

**Carl A. Rick** (315), in mortgage loan department of Prudential Insurance Co. (317), otherwise nature of employment not disclosed.



**Joseph De Martini** (324, 325), wholesale tobacco, partnership with his brother.

**Frans Schmitt** (337, 339), retired leathergoods manufacturer.

**Warren J. Tyson, Jr.** (348), clerk, Signal Oil Co.

**Louis A. Pastroni** (352), teller, Bank of America.

A total of 11 (not 10), women were examined. They were in addition to the 5 selected (see above):

**Florence M. Douglas** (273, 286-289), sales manager and buyer for a rice business which shipped by S. P.; cousin worked for S. P. at Elko; knew a man in the S. P.; excused by the court at plaintiff's suggestion.

**Mrs. A. McCullon** (289, 290), secretary to an S. P. Co. executive. Excused.

**Mrs. Eleanor Van Praag** (314), occupation not disclosed. Said she was prejudiced against defendant. Excused.

**Nell A. Biggins** (314, 329), with Sunset Feather Co., biased in favor of plaintiff. Excused.

**Miss Dianna M. Domeconi** (346, 347), occupation not disclosed and excused because biased in favor of plaintiff.

**Mrs. Helen G. Star** (350-352), occupation not disclosed, excused because biased against user of liquor.

In addition to the 3 women excused because they were biased in favor of plaintiff or against defendant **Emil Pahlka** (348), a real estate broker, was excused because biased against railroads.



Of the 37 examined there is not sufficient information to say what the occupation or business of 9 was. In addition to those noticed were **Harvey P. Clark** (273, 280, 305, 306), **Harry R. Land, Jr.** (273, 314,—with McKenzie and Co. but the nature of their business and his connection with it did not appear), **Gilbert L. Van Wormer** (300, 302). This makes a total of 9 about whom there is not enough known to make any statement as to economic or social position.

There were 10 of the 37 who are properly to be placed in the laboring or wage earning class: **Martinez**, a shipping clerk; **Mrs. McCullon**, a secretary or stenographer; **Thomas G. Stevenson, Jr.** (306, 307-313), having an undisclosed connection with a grain merchant and exporter; **Nell A. Biggins** with the Sunset Feather Co.; **Ricks**, apparently in a clerical position with a loan department of an insurance company; **Zola Taylor**, a bookkeeper; **George R. Dagnall** (329, 336, 337), working at the moment organizing the Marin County Community Chest Drive; **Tyson**, a clerk with the Signal Oil Co.; **Pasgroni**, the teller at the Bank of America; **James Di Maisimo** (361-363), a carpenter working for a macaroni factory, peremptorily challenged by the plaintiff.

Four were retired: **Surber**, from the Army, position not disclosed; **Andrew Verino** (273, 282, 298, 299, 346), apparently formerly in some phase of the insurance business; **Schmitt**, the retired leather manufacturer; **Clarence W. Dobie** (297), retired from an undisclosed connection with Crocker First National Bank.

Five jurors held semi-executive positions: **Mrs. Douglas**, sales manager and buyer for a rice concern; **Edgar R.**

**Trethway** (273, 279, 281, 294), credit manager for Earl C. Anthony, Inc., an automobile sales concern; **Homer F. Rosetti** (273, 280, 330, 343), a branch manager of Pacific Finance Corp.; **Allen J. Uren** (302), sales manager Gypsum Division, Pacific Portland Cement Co.; **Edwin G. Asplin** (353, 358), purchasing agent and traffic manager for Langendorf Bakeries.

Two were probably fairly important business men. **Thomas R. Edwards** (273, 333), was in the candle supply business and chairman of the board of his concern. The size of the business does not appear. **James A. Cambridge** (290) was auditor of Anglo California National Bank.

Seven were in the class of proprietors of business, the business apparently being small: **Wilmes** was the sign painter; **Leslie H. Carter** (273, 321), described himself as a dramatic book publisher; **Seamen J. Molkenbuhr** (323), was apparently the proprietor, or one of the proprietors, though he may have been only a salesman, of a jewelry concern; **De Martini** and his brother were partners in the wholesale tobacco business; **Emil Pahlka** was a real estate broker; **Mrs. Mescovich** was the wife of a restaurant keeper; **George S. Minot** (364), was an independent advertising counsellor.

Fifteen of the 37 had some connection, close or remote, with S. P. Co. or someone connected with it. **Mrs. McCullon** was employed by S. P. Co. as a secretary. **Rossetti** was the brother of a director. **Clark** knew an S. P. Co. director and possibly owned some stock,—he did not know. **Dobie** owned S. P. Co. stock. **Verino** for a short time, about 1900, had a boiler job with S. P. Co. **Trethway**, 22 or 23 years ago, worked for S. P. Co. for a short time

as an investigator; he had a cousin with S. P. Co. and some friends working for it. Several had no connection except that the concerns with which they were connected were shippers, as over the lines of other railroads: **Mrs. Douglas, Van Wormer, Uren** (who also knew an S. P. Co. director), **Stevenson** (whose brother's father-in-law worked for S. P. Co.) and **Asplin**. As was natural, they knew people connected with S. P. Co. **Cambridge** was with a bank which did some banking for S. P. Co. **Molkenbuhr** sold jewelry to an S. P. Co. employees club (not S. P. Co.). **Minot** knew a Mr. Turner.

## Appendix E

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**LEGAL RELATION BETWEEN DULY COMMISSIONED  
RAILROAD POLICE AND RAILROAD**

Nevada Compiled Laws, Section 6327: Act Approved March 22, 1941, provides:

“The Governor of this State is hereby authorized and empowered, upon the application of any railroad company, to appoint and to commission to serve during his pleasure one or more persons having the residential qualifications of an elector, designated by such company, and to serve at the sole expense of such company, as policeman or policemen, with the powers of peace officers, and who, after being duly sworn, may act as such policeman or policemen upon the premises or property owned or operated by such company. \* \* \*”

Under a similar statute it has been held that a railroad is not liable for malicious arrest by a railroad policeman.

“Respondeat superior has no application where there is no evidence tending to show that the company was instrumental in causing the arrest or subsequent prosecution.”

*Redgate v. S. P. Co.*, 24 C.A.2d 573, 581, 75 P.2d 658.

In *Maggi v. Pompa*, 105 C.A. 496, 289 P. 982 (hr. den.), where a bystander was shot by a special police officer, the Court approved an instruction that *prima facie* private employers are not liable for the acts of public officers, and that a special policeman comes within this rule. It

was held that there was a presumption that the special policeman's act was done in the performance of official duty. The payment of wages is insufficient to constitute a basis for liability.

Accord:

*St. John v. Reid*, 17 C.A.2d 5, 61 P.2d 363 (hr. den.);

*Squires v. S. P. Co.*, 42 C.A. 459, 183 P. 695;

*Goldberg v. R. Co.*, 97 N.J.L. 374, 117 Atl. 479;

*Pounds v. R. Co.*, 142 Ga. 486, 83 S.E. 96;

*R. Co. v. Kelly*, 177 F. 189 (C.C.A. 2);

*Red River Lumber Co. v. Cardenas*, 95 F.2d 157 (C.C.A. 9).

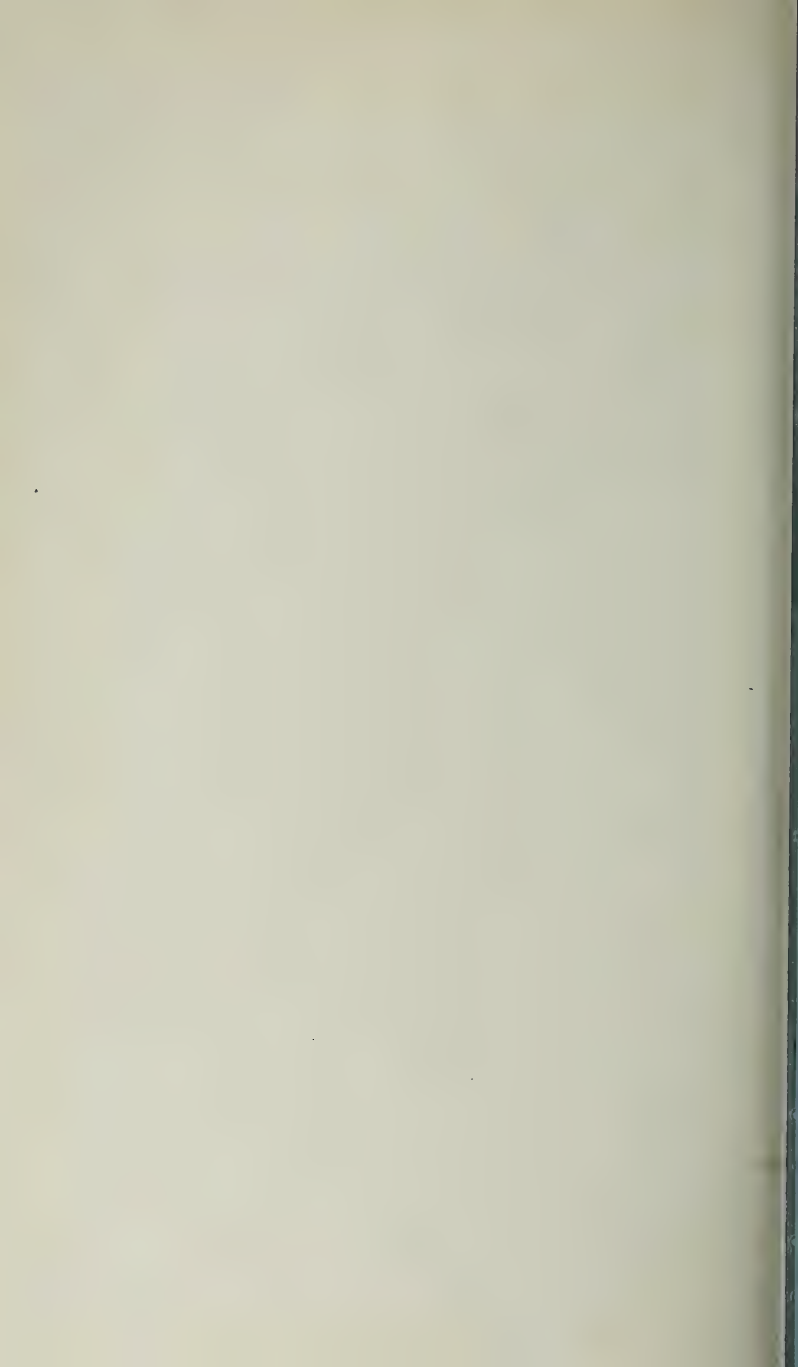
This last case recognized and applied the presumption noticed in the *Maggi Case* above, and was followed in *N. L. R. B. v. Red River L. Co.*, 109 F.2d 159, 160 (C.C.A. 9).

Following the above cases see *MacDonald v. Ogan*, 64 Idaho 173, 129 P.2d 654.









No. 11803

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

*see vol. 2505*

JOHN BARCOTT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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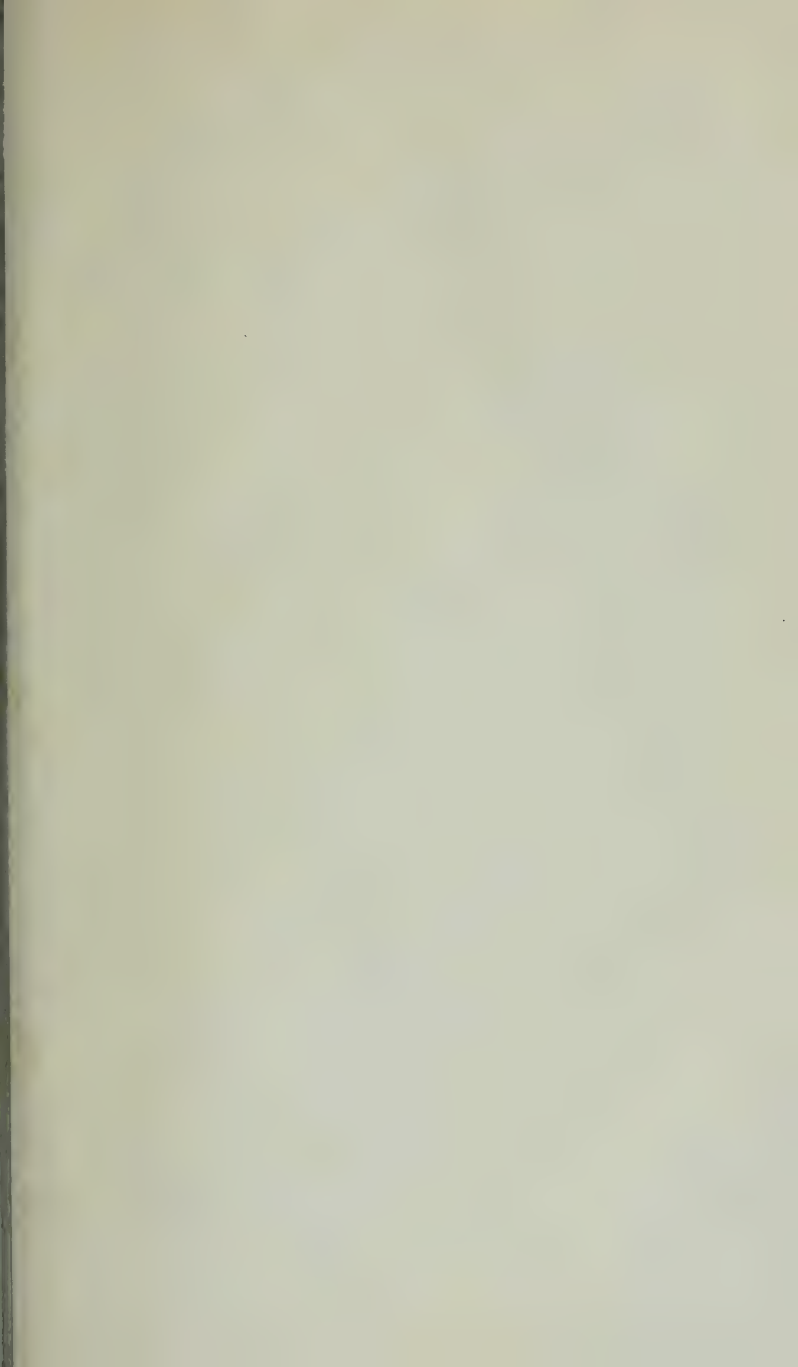
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for the Western District of Washington,  
Southern Division

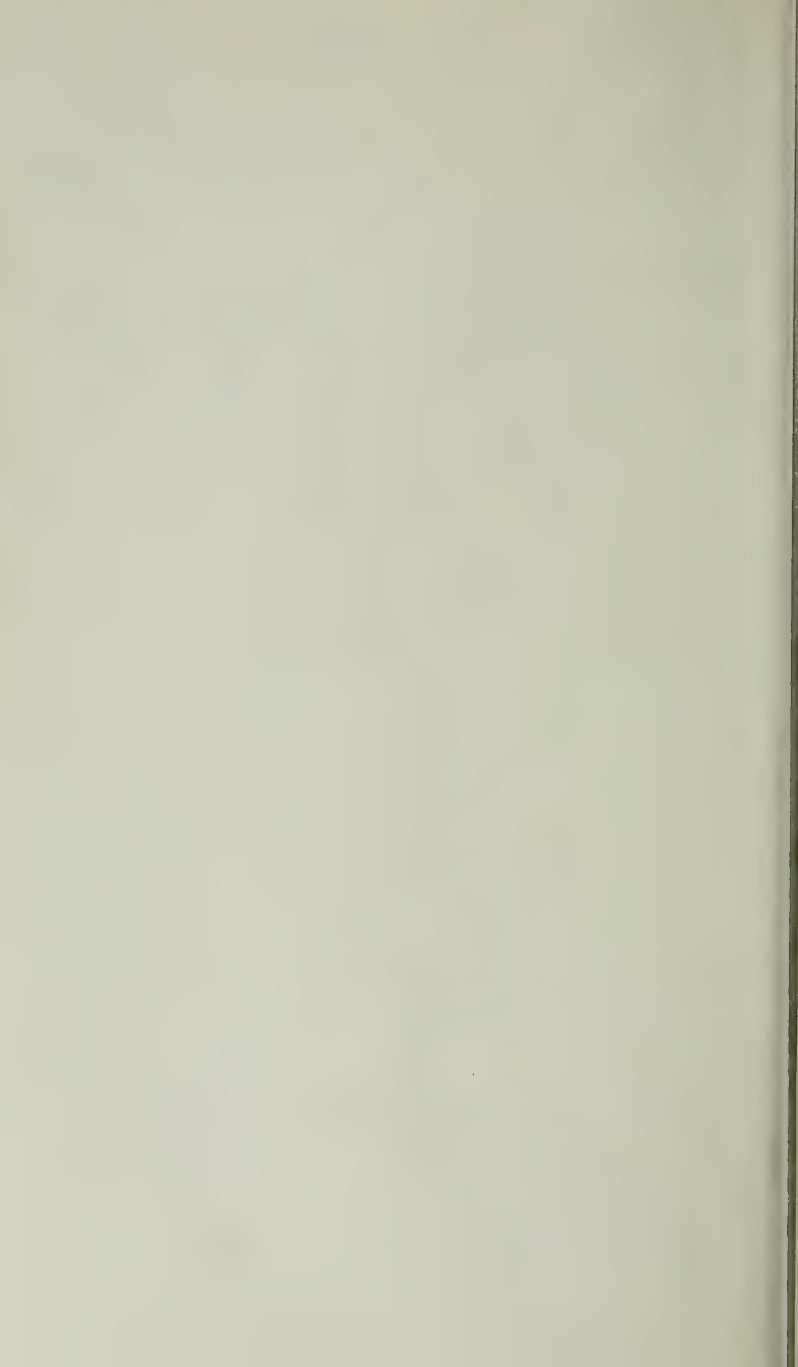
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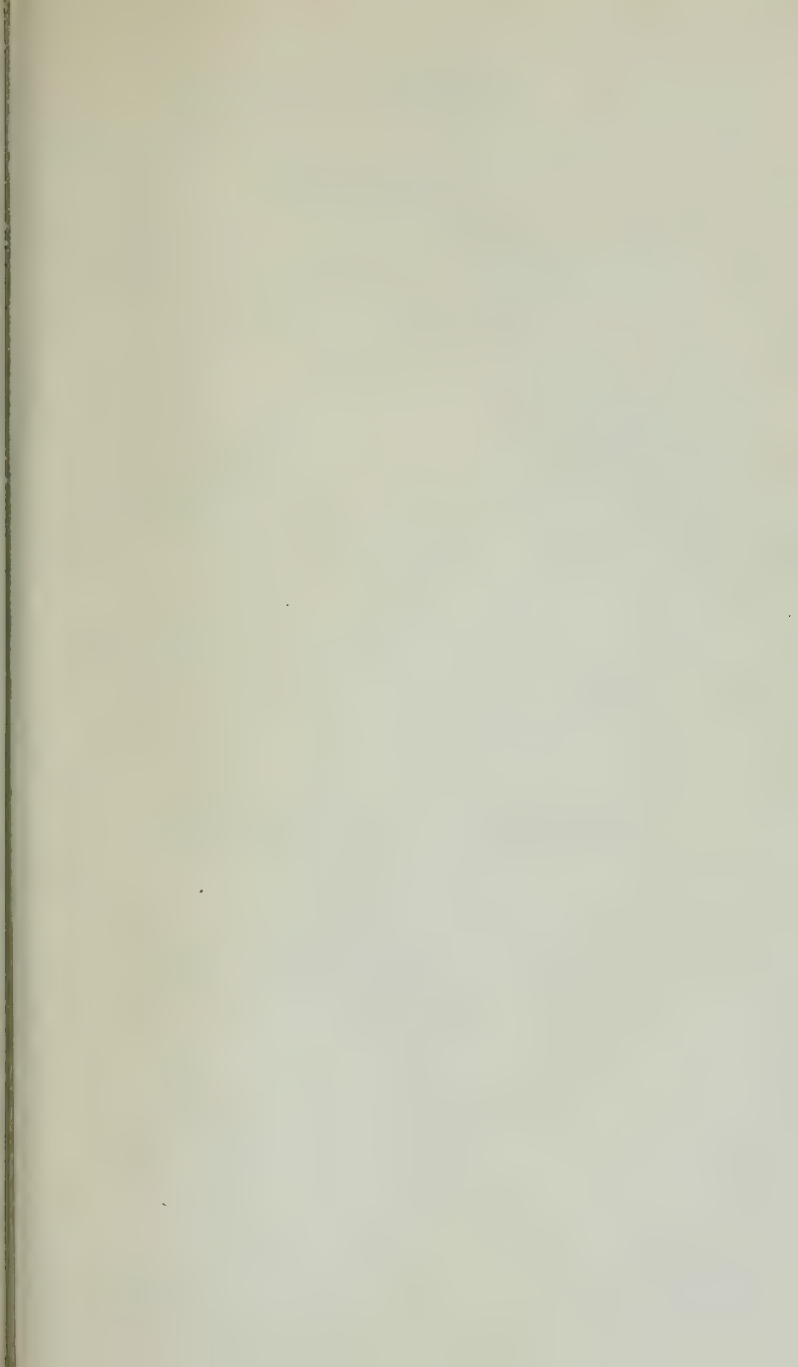
PAUL P. O'BRIEN, /  
CLERK













No. 11803

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United States  
Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellee.

United States District Court, Western District of  
Washington, Southern Division

No. 15845

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BARCOTT,

Defendant.

### INDICTMENT

The Grand Jury charges:

#### Count I.

That on or about the 12th day of February, 1944, at Tacoma, Washington, John Barcott, late of the City of Tacoma, State of Washington, who during the calendar year 1943 was married and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income and victory tax due and owing by him to the United States of America for the calendar year 1943 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington, at Tacoma, Washington, a false and fraudulent income and victory tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of \$6,720.40 and that the amount of tax due and owing thereon was the sum of \$1,545.38, whereas, as he then and there well knew, his net income for the said cal-



endar year, computed on the community-property basis, was the sum of \$12,406.33, derived as follows:

## Gross Income:

Dividends .....	\$	140.00	
Interest .....		141.93	
Interest on bonds.....		200.00	
Income from business .....	24,621.96		\$25,103.89

## Deductions:

Contributions .....	\$	200.00	
Taxes .....		91.23	291.23

Net Income: .....			\$24,812.66
John Barcott one-half community share			12,406.33

upon which said net income he owed to the United States of America an income and victory tax of \$3,646.25.

All in violation of 26 USC 145(b).

## Count II.

That on or about the 13th day of February, 1945, at Tacoma, Washington, John Barcott, late of the City of Tacoma, State of Washington, who during the calendar year 1944 was married and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1944 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington, at Tacoma, Washington, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis,

was the sum of \$5,632.57 and that the amount of tax due and owing thereon was the sum of \$1,288.45, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$9,926.61, derived as follows:

Gross Income:

Dividends and interest .....	\$	818.27	
Income from business .....		20,034.94	\$20,853.21

John Barcott one-half community share .....			\$10,426.61
--	--	--	-------------

Deductions:

Standard .....	\$	\$500.00	\$ 500.00
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Net Income: .....			\$ 9,926.61
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upon which said net income he owed to the United States of America an income tax of \$2,727.85.

All in violation of 26 USC 145(b).

### Count III.

That on or about the 15th day of March, 1946, at Tacoma, Washington, John Barcott, late of the City of Tacoma, State of Washington, who during the calendar year 1945 was married and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1945 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington, at Tacoma, Washington, a false and fraudulent income tax return wherein he stated that his net income for said calendar year,

computed on the community-property basis, was the sum of \$7,388.98 and that the amount of tax due and owing thereon was the sum of \$1,833.36, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$11,-138.92, derived as follows:

Gross Income:

Dividends and interest .....	\$ 1,258.74	
Income from business .....	22,019.09	\$23,277.83
<hr/>		<hr/>
John Barcott one-half community share .....		\$11,638.92

Deductions:

Standard .....	500.00	500.00
<hr/>		<hr/>

Net Income: ..... \$11,138.92

upon which said net income he owed to the United States of America an income tax of \$3,201.96.

All in violation of 26 USC 145(b).

A true bill.

/s/ HANS M. ANDERSON,  
Foreman.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ HARRY SAGER,  
Assistant United States  
Attorney.

Bail, \$2500.00.

/s/ CHARLES H. LEAVY,  
U. S. District Judge.

[Endorsed]: Filed May 13, 1947.

District Court of the United States, Western District of Washington, Southern Division

Commissioner's Docket No. 6

Case No. 718

UNITED STATES OF AMERICA,

vs.

JOHN BARCOTT.

COURT APPEARANCE BOND  
FOR JOHN BARCOTT

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of Twenty-five Hundred dollars (\$2500.).

The condition of this bond is that the defendant, John Barcott, is to appear in the District Court of the United States for the Western District of Washington at Tacoma, Washington, in accordance with all orders and directions of the court relating to the appearance of the defendant before the court in the above entitled case and if the defendant appears as ordered, then this bond is to be void, but if the defendant fails to perform this condition payment of the amount of the bond shall be due forthwith. If the bond is forfeited and the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court

United States Commissioner.

## JUSTIFICATION OF SURETIES

I, the undersigned surety, on oath say that I reside at 3705 South Sheridan, Tacoma, Washington; and that my net worth is the sum of Twenty-five Hundred dollars (\$2500.00).

I further say that I am depositing the sum of \$2500.00 in cash with the Clerk, United States District Court, Western District of Washington, Southern Division, Tacoma, Washington, as security of the United States for the Western District of Washington against each debtor jointly and severally for the amount above stated together with interest and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and other laws of the United States.

This bond is signed on this 14th day of May, 1947, at Tacoma, Washington.

/s/ JOHN BARCOTT,

Name of Defendant.

3705 South Sheridan,  
Tacoma, Washington.

Approved, signed and acknowledged before me  
this 14th day of May, 1947.

[Seal]      /s/ STUART H. ELLIOTT,

ity and indemnity on this bond, in accordance with the terms and conditions thereof.

/s/ JOHN BARCOTT,

Surety.

Sworn to and subscribed before me this 14th day of May, 1947, at Tacoma, Wash.

/s/ STUART H. ELLIOTT,

U.S. Commissioner.

[Endorsed]: Filed May 14, 1947.

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United States District Court, Western District of  
Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 19th day of May, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court:

[Title of Cause.]

Now on this 19th day of May, 1947, this cause comes on before the court for arraignment and plea. Harry Sager, Asst. U. S. Attorney, represents the government. Defendant in court represented by Counsel A. Ursich. Defendant and his counsel come forward and waive reading of the Indictment. Defendant arraigned and now enters a plea of not guilty to Counts 1, 2 and 3, which plea is ordered entered. Cause is set for trial on June 24.



United States District Court, Western District of  
Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 25th day of September, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 25th day of September, 1947, this cause comes on before the court for hearing on Defendant's motion for Bill of Particulars. Harry Sager, Asst. U. S. Attorney, represents the government and Frank Hale represents the defendant. Argument on motion for Bill of Particulars by Mr. Hale and Mr. Sager. Defendant's motion to dismiss denied and exception allowed. Defendant's motion for Bill of Particulars is now granted by the court with certain limitation. On Court's own motion, cause is reset for trial to a jury on Thursday, October 30th.

[Title of District Court and Cause.]

### MOTION TO DISMISS INDICTMENT

Comes now the defendant above named and moves to dismiss the indictment herein for the following reasons and upon the following grounds:

#### I.

That said indictment does not state facts sufficient to constitute a crime against the United States.

#### II.

That each count of said indictment, and the whole thereof, is so indefinite, vague, and uncertain that the defendant cannot ascertain and understand therefrom the nature of the charges against him in said indictment contained and cannot with reasonable diligence prepare his defense thereto.

GAGLIARDI, URSICH &

GAGLIARDI and

FRANK HALE,

Attorneys for Defendant,

1116 Washington Building,

Tacoma 2, Washington.

Copy received May 28, 1947.

HARRY SAGER,

Assistant U. S. Attorney.

[Endorsed]: Filed May 28, 1947.

[Title of District Court and Cause.]

## MOTION FOR BILL OF PARTICULARS

Comes now the defendant above named and respectfully moves the Court for an order directing the plaintiff above named to furnish and supply to the defendant a Bill of Particulars herein, making the indictment more definite and certain, and setting in said Bill of Particulars the following, to-wit:

### I.

With respect to Count I of said indictment:

1. By setting forth which items of gross income are alleged to have been falsely reported by the said defendant.

2. That in the event that it is charged that either the alleged items of dividends, interest, interest on bonds, or income from business, are alleged to have been falsely reported by the defendant, to set forth which of said items and in what particular amount each item is charged to have been falsely reported.

3. Concerning the item designated in the indictment as "Dividends" by setting forth from what source said Dividends are alleged to have been received.

4. Concerning the item designated in the indictment as "Interest" by setting forth from what source said Interest is alleged to have been received.

5. Concerning the item designated in the Indictment as "Interest on Bonds," by setting forth

from what source said Interest on Bonds is alleged to have been received.

6. Concerning the item designated in the Indictment as "Income from Business," by setting forth the nature, type, or kind of business from which it is alleged that the defendant derived said income.

7. Concerning the item designated in the Indictment as "Income from Business," by setting forth whether or not the figure \$24,621.96 represents the total gross receipts of such business after deduction of the expenses of the operation thereof, and if so, what amounts have been allowed by the plaintiff for expenses of operation of such business.

8. Concerning the item designated in the Indictment as "Income from Business," by setting forth the gross receipts alleged to have been derived from the operation of such business and the amounts allowed by the plaintiff as legitimate expenses of the operation thereof.

## II.

With respect to Count II of said Indictment:

1. By setting forth which items of gross income are alleged to have been falsely reported by the said defendant.

2. That in the event that it is charged that either the alleged items of Dividends and interest or Income from business, are alleged to have been falsely reported by the defendant, to set forth

which of said items and in what particular amount each item is charged to have been falsely reported.

3. Concerning the item designated in the indictment as "Dividends and interest," by setting forth from what source said Dividends and interest are alleged to have been received.

4. Concerning the item designated in the Indictment as "Income from Business," by setting forth the nature, type, or kind of business from which it is alleged that the defendant derived said income.

5. Concerning the item designated in the Indictment as "Income from Business," by setting forth whether or not the figure \$20,034.94 represents the total gross receipts of such business after deduction of the expenses of the operation thereof, and if so, what amounts have been allowed by the plaintiff for expenses of operation of such business.

6. Concerning the item designated in the Indictment as "Income from Business" by setting forth the gross receipts alleged to have been derived from the operation of such business and the amounts allowed by the plaintiff as legitimate expenses of the operation thereof.

### III.

With respect to Count III of said Indictment:

1. By setting forth which items of gross income are alleged to have been falsely reported by the said defendant.

2. That in the event that it is charged that

either the alleged items of Dividends and interest or Income from business, are alleged to have been falsely reported by the defendant, to set forth which of said items and in what particular amount each item is charged to have been falsely reported.

3. Concerning the item designated in the Indictment as "Dividends and interest," by setting forth from what source said Dividends and Interest are alleged to have been received.

4. Concerning the item designated in the Indictment as "Income from Business," by setting forth the nature, type or kind of business from which it is alleged that the defendant derived said income.

5. Concerning the item designated in the Indictment as "Income from Business," by setting forth whether or not the figure \$22,019.09, represents the total gross receipts of such business after deduction of the expenses of the operation thereof, and if so, what amounts have been allowed by the plaintiff for expenses of operation of such business.

6. Concerning the item designated in the Indictment as "Income from Business," by setting forth the gross receipts alleged to have been derived from the operation of such business and the amounts allowed by the plaintiff as legitimate expenses of the operation thereof.

Defendant requests that the plaintiff be required to furnish to this defendant an itemized statement setting forth the sources from which dividends were derived, interest on bonds received, and the



business from which said income was derived as hereinabove requested, and what items, if any, were omitted from the return of income tax made by this defendant.

GAGLIARDI, URSICH &  
GAGLIARDI and  
FRANK HALE,  
Attorneys for Defendant.

State of Washington,  
County of Pierce—ss.

Frank Hale being first duly sworn on oath,  
deposes and says:

That he is one of the attorneys for the defendant in the above entitled case; that the foregoing information is necessary in order for the defendant to properly and adequately prepare his defense to the indictment returned in the above entitled case.

/s/ FRANK HALE.

Subscribed and sworn to before me this 27th  
day of May, 1947.

[Seal] /s/ A. M. URSICH,  
Notary Public in and for the State of Washington,  
residing at Tacoma.

Received copy May 28, 1947.

/s/ HARRY SAGER,  
Assistant U. S. Attorney.

[Endorsed]: Filed May 28, 1947.

[Title of District Court and Cause.]

ORDER

This matter coming on upon the oral application of the defendant above named requesting leave to file his motion to dismiss, and it appearing to the Court that the said defendant was arraigned at the bar of this Court on the 19th day of May, 1947, in the above entitled cause, and there appearing to be no reason why the said defendant should not be authorized to file his motion to dismiss, now, therefore, it is hereby

Ordered, that defendant's motion to dismiss the indictment herein be and the same hereby is authorized to be filed herein.

Done in open Court this 28th day of May, 1947.

/s/ CHARLES H. LEAVY,  
U. S. District Judge.

Presented by:

/s/ A. M. URSICH.

O.K.

/s/ HARRY SAGER,  
Assistant U. S. Attorney.

[Endorsed]: Filed May 28, 1947.

[Title of District Court and Cause.]

## BILL OF PARTICULARS

Comes now the plaintiff and particularizes the allegations of the indictment herein in accordance with the order of the court heretofore made and in that behalf states as follows:

### I.

Particularizing Count I and the items alleged as constituting gross income, plaintiff states that the sources of such items are as follows:

(1) The dividends are from stock holdings in Fishermans Packing Corporation, at Anacortes, Washington.

(2) The interest is from savings account in National Bank of Washington, Tacoma, and from a real estate contract and conditional sales contract for the sale of personal property, in each of which Antone Barcott was the purchaser.

(3) The item "Interest on Bonds" is interest from United States Savings Bonds, Series "G."

(4) The item "Income from Business" is from a restaurant business known as the California Oyster House, 940 Pacific Avenue, Tacoma, Washington.

### II.

Particularizing Counts II, and III, plaintiff states that the items "Dividends & Interest" are

from the same sources as particularized in Count I, and the items "Income from Business" are from the same business.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ HARRY SAGER,  
Assistant United States  
Attorney.

[Endorsed]: Filed September 30, 1947.

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United States District Court, Western District of  
Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 30th day of October, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 30th day of October, 1947, this cause comes on before the court for trial to a jury. Case is called. Both sides ready. Defendant present in court. Roll call of jury made showing 31 present. Jurors sworn as to qualifications. Juror Ansel F. Steward excused for cause. Jurors Henry Mandles,

William R. Allen and Carl Schafer excused on challenges of the government. Jurors Arthur T. Armstrong, J. J. McDonald, Anna Collinger and George E. Floyd excused on challenges of the defendant. The following jurors drawn, accepted by both sides and sworn to try the case:

George Palmer	Harry E. Burton
Sara M. Sanders	Francis A. Baker
Victor F. Johnson	Wesley D. Lefler
Glen Bettesworth	William J. Hennessy
Edward B. Anderson	Roscoe H. Brown
Lottie B. Mills	David Sampson

All jurors not now serving on this case are excused until Monday, November 10, 1947, at 9:45 a.m. unless otherwise notified. Defendant in court represented by counsel S. A. Gagliardi, Anthony Ursich and Frank Hale. Allen Pomeroy, Asst. U. S. Attorney, represents the government.

Trial is commenced. At 10:55 a.m. jurors admonished. At 11 a.m. court recessed. At 11:15 a.m. court is again in session. Defendant, jurors and all counsel present. Opening statement by Mr. Pomeroy. Defendant reserves opening statement. Plaintiff witness Stanley Nielsen is sworn and testifies. Plaintiff exhibits 1, 2, 3, 4, 5 and 6 admitted. At 12 noon jurors are excused until 2 p.m. Remarks by Mr. Gagliardi and the Court. Defendant's motion to strike is denied by the Court and exception allowed.

At 12:10 p.m. court recessed until 2 p.m. At 2 p.m. court is again in session. Defendant, jurors and all counsel present. Plaintiff witness Sparks Washburn is sworn and testifies. Plaintiff exhibit 7 admitted over the objections of defendant's counsel and exception allowed. Plaintiff exhibits 8, 9 and 10 admitted. Plaintiff exhibit 11 admitted over the objections of defendant's counsel and exception allowed. Plaintiff witness James Kerr is sworn and testifies. Plaintiff exhibit 12 admitted. Plaintiff witness John Planchich is sworn and testifies. Plaintiff exhibit 13 marked for identification and withdrawn from the custody of the clerk by permission of the court (both counsel so agree). Plaintiff witness Josephine Corvin is sworn and testifies. Plaintiff witness Harry O. Swanson is sworn and testifies.

At 3:15 p.m. court recessed. At 3:30 p.m. court is again in session. Defendant, jurors and all counsel present. Trial resumes. Harry O. Swanson resumes the witness stand for further testimony. Plaintiff exhibit 14 admitted conditionally, over the objections of defendant's counsel. Plaintiff exhibits 15, 16 and 17 admitted. At 4 p.m. the government rests. Jurors admonished and excused until 10 a.m. Friday. Mr. Ursich and Mr. Hale make argument re: motion to dismiss and for a directed verdict, which are denied by the court and exception allowed. Remarks by the Court. Court allows Mr. Ursich to withdraw plaintiff exhibits 7, 8 and 9. Trial is continued until Friday, October 31st, at 10 a.m.



United States District Court, Western District of  
Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 31st day of October, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 31st day of October, 1947, this cause comes on before the court for further trial to a jury. Defendant and all counsel present. Statement on motion to dismiss made by Mr. Gagliardi. Motion to dismiss is denied by the Court and exception allowed. All jurors now present. Trial resumes. Statement by Mr. Ursich. Defendant witness John Barcott is sworn and testifies.

At 11 a.m. court recessed. At 11:15 a.m. court is again in session. Defendant, jurors and all counsel present. Defendant witness John Barcott resumes the witness stand for further testimony. Defendant exhibits A-1 and A-2 admitted.

At 12 noon court recessed until 2 p.m.

At 2 p.m. court is again in session. Trial is suspended for hearing of ex parte matters.

At 2:10 p.m. trial resumes. Defendant, jurors and all counsel present. Defendant witness John Barcott resumes the *witness* for further testimony.

Defendant witness Katy Barcott is sworn and testifies. Defendant witness Anton Barcott is sworn and testifies. Plaintiff witness John Plancich resumes the stand for further testimony. Defendant witness Anton Suyran is sworn and testifies. Defendant witness Mrs. Pearl McCord is sworn and testifies. Jurors admonished. Jurors are now excused until Monday at 10 a.m. Mr. Gagliardi withdraws Defendant exhibit A-3 from the custody of the clerk by permission of the court. Trial is continued until Monday morning at 10 a.m.

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United States District Court, Western District of  
Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 3rd day of November, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding. among other proceedings had were the following truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 3rd day of November, 1947, this cause comes on before the court for further trial to a jury. Defendant, jurors and counsel present. Trial resumes. Defendant witness Marie Dascher is sworn and testifies. Defendant witness Robert B. Knego is sworn and testifies. Defendant witness

Robert E. Birch resumes the witness stand for further testimony. Defendant exhibit A-3 offered but not admitted and exception allowed.

At 11:20 a.m. court recessed. At 11:45 a.m. court is again in session. Defendant, jurors and all counsel present. Trial is resumed. Defendant witness Robert E. Birch resumes the witness stand for further testimony. Stipulation as to Mr. Barcott's employment of Attorney Thomas Ray and subsequent loss of records; entered herein by counsel for both parties. Stipulation as to the \$1200.00 in the Income Tax Return of John Barcott for 1945 as being correct; entered herein by counsel for both parties. Defendant witness John Barcott resumes the witness stand for further testimony. Plaintiff exhibits 20 and 21 admitted. At 12:15 p.m. defendant rests. Court now grants each side one hour to argue case.

At 12:15 p.m. court recessed until 2 p.m. At 2 p.m. court is again in session. Defendant, jurors and all counsel present. Jurors are now excused by the court. Defendant's motion for acquittal made by Mr. Ursich and denied by the Court. Defendant's counsel excepts to certain instructions and exceptions allowed. Jury is again present in court. Mr. Pomeroy begins argument. Mr. Hale begins argument.

At 3:20 p.m. court recessed. At 3:35 p.m. court is again in session. Defendant, jurors and all counsel present. Mr. Gagliardi begins argument. Mr. Pomeroy makes concluding argument. At 4:15 p.m. jury is charged by the court.

At 4:50 p.m. jurors retire to deliberate. Plaintiff exhibit 14 admitted. Edith Redmayne sworn in as special bailiff and bailiffs are now sworn upon taking charge of the jury.

At 4:55 p.m. court adjourned until reconvened. Plaintiff and defendant requested instructions are filed.

At 10:20 p.m. court is again in session. Defendant, jurors and counsel Frank Hale and Anthony Ursich represent the defendant. Guy A. B. Dovell, Asst. U. S. Attorney, represents the government. Jury Foreman Roscoe H. Brown states that the jury has arrived at a verdict, which is handed to the court and the clerk and read by the clerk as follows: We the jury empanelled in the above entitled cause find the defendant John Barcott guilty as charged in count 1 of the indictment herein; guilty as charged in count 2 of the indictment herein; guilty as charged in count 3 of the indictment herein. Dated November 3, 1947. Signed Roscoe H. Brown, Foreman. Jurors are polled and each answers affirmatively and verdict is ordered entered. Jurors are now excused and are to report at 10 a.m. Monday, November 10, 1947, unless otherwise notified. Court orders that defendant may remain at large on present bond of \$2500.00.

United States District Court for the Western  
District of Washington, Southern Division

No. 15845

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BARCOTT,

Defendant.

PLAINTIFF'S REQUESTED INSTRUCTIONS

Instruction No. One

This is a criminal action in which the defendant, John Barcott, is charged by an indictment with the violation of the Internal Revenue law. The indictment contains three counts and specifically alleges, in the first count, that on or about February 12, 1944, at Tacoma, Washington, John Barcott wilfully attempted to defeat and evade a large part of the income tax due and owing by him for the calendar year 1943. That he did this by filing with the Collector of Internal Revenue a false and fraudulent income tax return wherein he stated that his income for said calendar year was the sum of \$6,720.40, and that the amount of tax due and owing thereon was the sum of \$1,545.38, whereas, as he then and there well knew, his net income for the said calendar year was the sum of \$12,406.33 and that the tax due thereon was the sum of \$13,646.25.

The second count alleges that on or about February 13, 1945, at Tacoma, Washington, John Barcott wilfully attempted to defeat and evade a large part of the income tax due and owing by him for the calendar year 1944. That he did this by filing with the Collector of Internal Revenue a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of \$5,632.57 and that the amount of tax due and owing thereon was the sum of \$1,288.45, whereas, as he then and there well knew, his net income for the said calendar year was the sum of \$9,926.61 and that the tax due thereon was the sum of \$2,727.85.

Count three of the indictment charges that John Barcott wilfully attempted to defeat and evade a large part of the income tax due and owing by him for the calendar year 1945, by filing on March 15, 1946, a false and fraudulent income tax return wherein he stated that his net income for 1945 was the sum of \$7,388.98 and that the amount of tax due and owing thereon was the sum of \$1,833.36, whereas, as he then and there well knew, his net income for the said calendar year 1945, was \$11,138.92 and that the tax due thereon was the sum of \$3,201.96.

The defendant has entered a plea of not guilty to all of the charges contained in the indictment, and that places upon the government the burden of proving all material allegations in said charge beyond a reasonable doubt.

Given in substance.

C. H. L.



## Instruction No. Two

This indictment is brought under a section of the Internal Revenue law which provides as follows:

“\* \* \* Any person who wilfully attempts in any manner to evade or defeat any tax imposed \* \* \* or the payment thereof, \* \* \*” shall be punished.

The essential elements of the offense charged in the indictment under this law are these:

1. That the defendant owed more income tax than shown in his return.
2. That he wilfully attempted to evade or defeat any part of said tax bill by filing a false return or by attempting to conceal from the Collector his true and correct income.

If you find the existence of each of these elements beyond a reasonable doubt you should find the defendant guilty. If you have any reasonable doubt as to the existence of either of these elements you should acquit him.

Given in substance.

C. H. L.

## Instruction No. Three

You will observe that one of these elements of the offense charged in Count One, is that the defendant wilfully attempted to evade or defeat payment of his just tax. A wilful attempt means an intentional one and it is, therefore, necessary that the

government prove that in filing his income tax return for 1942, the defendant thereby intended to evade and defeat payment of some portion of his income tax. It is psychologically impossible for you to enter into the mind of the defendant and determine the intent with which he operated. You must, therefore, determine the motive, purpose and intent from the testimony which has been presented, and you will consider all of the circumstances disclosed by the evidence, bearing in mind that the law presumes that every man intends the legitimate consequent of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. The color of the act determines the complexion of the intent. Intent is presumed when the unlawful act is proven to have been knowingly committed.

Given in substance.

C. H. L.

#### Instruction No. Four

You are instructed that the government is not obliged to prove an attempted evasion of the entire amount of the tax as alleged in the indictment, but it is sufficient for the government to prove beyond a reasonable doubt that the defendant attempted to evade any substantial portion of the tax liability.

Given.

C. H. L.

[Endorsed]: Filed Nov. 3, 1947.

[Title of Court and Cause.]

DEFENDANT'S REQUESTED  
INSTRUCTIONS

Instruction No. 1

You are instructed that the fact that this defendant has been indicted and placed on trial before you is no evidence that he is guilty of the crime charged. All the presumptions of law are that he is innocent. This presumption of law stays with him throughout all the stages of the trial until the evidence, introduced for your consideration, becomes so strong as to break down this presumption and convinces you beyond all reasonable doubt of his guilt.

A "reasonable doubt" is such a doubt that causes a man of ordinary prudence to pause and hesitate in one or more important transactions of life concerning his own affairs.

If you have such a doubt, you must acquit the defendant.

Given in substance.

C. H. L.

Instruction No. 2

You are instructed that the prosecution relies upon what has been referred to by the Government's witness as the "net worth" of the defendant on a certain date; that is, that the defendant's "net worth" or that the total assets owned by the defendant on December 31, 1942, were of a stated amount, and that between January 1, 1943, and the

31st day of December, 1943, his assets or "net worth" had increased to an amount over and above what he reported was his net income for that year; likewise, the prosecution contends that his net worth on the 1st day of January, 1944, was a stated amount, and that at the end of that year his "net worth" or assets had increased to an amount greatly in excess of the amount which he reported was his net income for the year. The same contention is made for the year 1945.

Given in substance.

You are instructed that the prosecution must prove to you, beyond all reasonable doubt, the following facts:

- (a) That the defendant on December 31, 1942, did not own or possess any greater amount of assets or "net worth" than that which the prosecution claims the defendant owned on that date.

Refused.

- (b) That between the 1st day of January, 1943, and the 31st day of December of that year, the assets or "net worth" of the defendant increased substantially to an amount in excess of what he reported was his net income for that year.

Given in substance.

- (c) That the assets purchased for the year 1943 were purchased and acquired with net in-

come of the defendant derived from the following sources:

Refused.

2-A.

1. Dividends from the Fishermen's Packing Corporation of Anacortes, Washington;

2. Interest from savings accounts in the National Bank of Washington, Tacoma, Washington, from a real estate contract and personal property conditional sales contract in which Antone Barcott was the purchaser;

3. Interest on bonds from U. S. Savings Bonds, Series G;

4. Net income from his business known as the California Oyster House, 940 Pacific Avenue, Tacoma, Washington, and from no other sources.

(d) That the defendant wilfully and knowingly, for the purpose of evading a large amount of tax, did file or cause to be filed with the Collector of Internal Revenue a false and fraudulent income tax and victory tax return wherein he stated that his net income for that year was substantially less than the net income of the defendant.

The same rule of law applies for the calendar years 1944 and 1945.

A "substantial amount" means an amount substantially in excess of what the defendant actually paid.

Unless the Government has proven to you, beyond all reasonable doubt, the foregoing facts, it is your duty to acquit the defendant.

Refused.

C. H. L.

Instruction No. 3

The essential element of the commission of the offense charged in each of the counts of the indictment is the willful attempt to defeat and evade an income tax and victory tax due from the defendant to the United States for the years 1943, 1944 and 1945.

The term "willful" implies on the part of the defendant a knowledge and a purpose to do wrong.

You are, therefore, instructed, and unless you find in the case beyond a reasonable doubt that the defendant, with a knowledge and purpose to do wrong, attempted to evade and defeat the income taxes due from him in the United States during such years, and that such attempt was with an intention on his part to defraud the Government, you will acquit the defendant; or if you have a reasonable doubt of the defendant's "wilfulness" as that term has been defined to you, or if you have a reasonable doubt of the defendant's intention to defeat and evade the payment of the tax due from him, notwithstanding the fact that you may have come to the conclusion that the defendant actually owed a tax to the United States for such years, you will acquit the defendant.

Given in substance.

C. H. L.



## Instruction No. 4

In connection with the expression "willful attempt to defeat or evade" the tax, you are instructed that the word "willful" means knowingly, intentionally, and with an evil motive.

It is not intended by the law that a person who in good faith misunderstands his tax liability, or omits to report items which he honestly believes are not taxable or does not regard as income in the ordinary sense of the word, or who negligently fails to make an accurate report or who fails to maintain adequate records, should become a criminal by his failure to measure up to the prescribed standard of conduct.

The law only intends that those persons who knowingly, intentionally and with evil motive attempt to defeat or evade their tax should be criminally punished.

Therefore, even though you were to find that the defendant failed to pay or report the correct amount of income and victory taxes due from him to the United States during the years 1943, 1944 and 1945, nevertheless, if such failure on his part was not knowingly and intentionally done and was not accompanied by an evil motive to defeat or evade the tax, then you must return a verdict of acquittal.

Given in substance.

C. H. L.

## Instruction No. 5

You are instructed that if you find from the evidence that the defendant committed or attempted to commit some offense other than the one charged in the indictment, such finding does not justify you to find the defendant guilty of the crime charged in the indictment. Such evidence cannot establish guilt under the present charge. It is submitted to you as a circumstance only, which can be considered with other facts and circumstances in determining the guilt or innocence of the defendant, and for no other purpose.

Given in substance.

C. H. L.

## Instruction No. 6

You are instructed that the prosecution in this case relies upon circumstantial evidence to convict the defendant. Circumstantial evidence is legal and competent evidence, but to justify the inference of guilt from circumstantial evidence alone, the facts proven from which it is asked that the guilt of the defendant be inferred must be proven beyond a reasonable doubt, must be consistent with each other and must not only clearly point to his guilt, but must be inconsistent with any other reasonable theory upon which his innocence may be maintained.

Unless you so find, it is your duty under your oath to acquit the defendant.

Given in substance.

C. H. L.

## Instruction No. 7

It is an essential element of the offense as charged in the indictment, which must be proved to you beyond a reasonable doubt, that there was actually a tax due from the defendant over and above which he has reported during the years 1943, 1944 and 1945, and not for any other year.

Given in substance.

C. H. L.

If you do not find from the evidence submitted to you, beyond a reasonable doubt, that there are taxes due for the above-mentioned years over and above that reported by him, then you must acquit the defendant, even though you may find that the defendant should have paid additional tax for other years.

Refused not an issue.

C. H. L.

[Endorsed]: Filed November 3, 1947.

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[Title of District Court and Cause.]

## REQUESTED INSTRUCTION No. 8

Comes Now the defendant and respectfully requests this Honorable Court that the hereto attached instruction be given to the Jury, and that the same

be added and attached to the instructions requested by the defendant and marked "Instruction No. 8."

GAGLIARDI, URSICH &

GAGLIARDI,

Attorneys for Defendant.

/s/ FRANK HALE.

Instruction No. 8

You will not be justified in this case of convicting the defendant of having wilfully and knowingly attempted to defeat and evade the payment of his just tax if you find that small amounts were omitted from his income tax return which could easily be overlooked or forgotten by the defendant.

The Government must prove to you, beyond a reasonable doubt, that the amount, if any, which the defendant failed to pay, was a substantial amount, and although the Government need not prove the exact amount set forth in the indictment, it must, nevertheless, be an amount substantially in excess of what the defendant actually paid.

Given in part.

Refused in part.

C. H. L.

[Endorsed]: Filed November 3, 1947.

District Court of the United States, Western  
District of Washington, Southern Division

No. 15845

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BARCOTT,

Defendant.

VERDICT

We, the jury empanelled in the above-mentioned  
cause, find defendant John Barcott

.....guilty as charged in Count I of the Indict-  
ment herein;

.....guilty as charged in Count II of the Indict-  
ment herein;

.....guilty as charged in Count III of the In-  
dictment herein.

Dated November 3, 1947.

/s/ ROSCOE H. BROWN,  
Foreman.

[Endorsed]: Filed November 3, 1947.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL,  
OR, IN THE ALTERNATIVE, FOR A NEW  
TRIAL.

The defendant hereby renews his motion for judgment of acquittal heretofore made at the conclusion of the Government's case in chief, and also made at the close of all the evidence, or, in the alternative, the defendant moves the court to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion for acquittal at the conclusion of the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The court erred in admitting testimony of the witness Stanley Nielsen, to which objections were made.
5. The court erred in admitting testimony of the witness Harry O. Swanson, to which objections were made.
6. The court erred in admitting testimony of the witness James T. Kerr, to which objections were made.
7. The court erred in the admission of the Government's Exhibit No. 11, to which objections were made.
8. The court erred in charging the jury and in refusing to charge the jury as requested.



9. The court erred in overruling objections to questions addressed to the defendant on cross-examination.

10. The court erred in failing to limit the Government in its proof in conformance with the Indictment and Bill of Particulars and in allowing the Government to introduce evidence in substantial variance therewith.

11. The court erred in precluding defendant's counsel from making adequate objections to testimony being introduced by the Government.

12. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: The attorney for the Government stated in his argument that the defendant was guilty without drawing said deduction from a reference to the evidence; that this was an important case to the Government, and that this verdict was needed to set an example to other taxpayers.

GAGLIARDI, URSICH &  
GAGLIARDI,  
/s/ FRANK HALE,  
Attorneys for Defendant.

Receipt acknowledged this 5th day of November, 1947.

/s/ HARRY SAGER,  
Ass't. U. S. Attorney D.B.

[Endorsed]: Filed November 5, 1947.

United States District Court, Western District  
of Washington, Southern Division

No. 15845

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BARCOTT,

Defendant.

JUDGMENT AND SENTENCE

On this 24th day of November, 1947, came the attorney for the government and the defendant appeared in person and by Anthony M. Ursich and Frank Hale, his attorneys, and the court having directed that no pre-sentence investigation be made,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, a jury having been regularly impanelled and a trial held on the merits and a verdict of guilty rendered by the jury of a violation of 26 USC 145(b) (Income tax evasion), as charged in Counts I, II, and III of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) months on each of counts I, II, and III, and further that he pay to the United States of America the sum of \$750.00 on each of said counts, making a total fine of \$2,250.00, and further that he pay the costs of prosecution herein to be taxed, and that he stand committed until such fine and costs are paid or until he is otherwise discharged in the manner provided by law. Provided that the sentences of imprisonment as to each of said counts shall run concurrently with each other and not consecutively.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that a copy serve as the commitment of the defendant.

Done In Open Court this 24th day of November, 1947.

/s/ CHARLES H. LEAVY,

United States District Judge.

Presented by:

/s/ HARRY SAGER,

Assistant United States  
Attorney.

Entered in Crim. Docket 11, on November 24, 1947.

MILLARD P. THOMAS,  
Clerk.

[Endorsed]: Filed November 24, 1947.

United States District Court, Western District  
of Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 24th day of November, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 24th day of November, 1947, this cause comes on before the court for motion for new trial. Defendant in court represented by counsel Anthony Ursich. Harry Sager, Asst. U. S. Attorney, represents the government. Mr. Ursich argues defendant's motion for new trial. Motion for a directed verdict and motion for new trial now denied by the Court. Remarks by the Court. Court now states that a pre-sentence report in the above cause will not be necessary.

Defendant in court represented by counsel Anthony Ursich and Frank Hale. Remarks by the Court. It is the judgment of this court that the defendant upon the verdict of guilty, is guilty and is sentenced to be committed to the custody of the Attorney General to serve a sentence of 10 months on counts 1, 2 and 3 of the indictment, said sentence to run concurrently, and to pay a fine of \$750.00 on each of the three counts of the indictment. Present bond of \$2500.00 to remain in effect.

At 11:45 a.m. defendant is again in court represented by counsel Anthony Ursich and Frank Hale. Written Judgement and Sentence having been approved by the defendant and his counsel as orally pronounced is now signed by the court and filed.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Appellant: John Barcott, 3705 South Sheridan, Tacoma, Washington.

Attorneys for Appellant: Gagliardi, Ursich & Gagliardi and Frank Hale, 1116 Washington Building, Tacoma, Washington.

Offense: Attempt to defeat and evade income tax. Charged on three counts for the years 1943, 1944 and 1945 respectively. (26 USC 145(b)).

Judgment entered against the appellant on the 24th day of November, 1947, having been convicted upon his plea of not guilty by a jury and sentenced to ten months imprisonment on each count, said sentences of imprisonment to run concurrently and not consecutively, and also to pay a fine of \$750.00 on each count and to pay the costs of prosecution.

The above named appellant, through his attorneys of record, Gagliardi, Ursich & Gagliardi and Frank Hale, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated November 25, 1947.

GAGLIARDI, URSICH &  
GAGLIARDI,  
FRANK HALE,  
Attorneys for Appellant.

Certified copy of the within Notice of Appeal, together with Clerk's Statement of Docket Entries herein, sent to Clerk, U. S. Circuit Court of Appeals this 26th day of November, 1947. Copy also delivered to U. S. Attorney.

E. E. REDMAYNE,  
Deputy Clerk.

[Endorsed]: Filed November 25, 1947.

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[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated and agreed by and between the above named defendant through his attorneys of record, and the plaintiff, through its attorneys of record, that an order may be entered authorizing the court to extend the defendant's time in which to file his record on appeal and docket the cause of action up to and including the 4th day of February, 1948.

/s/ J. CHARLES DENNIS,  
United States Attorney,  
/s/ HARRY SAGER,  
Asst. United States Attorney,  
Attorneys for Plaintiff.

GAGLIARDI, URSICH &  
GAGLIARDI,  
/s/ FRANK HALE,  
Attorneys for Defendant.

[Endorsed]: Filed December 29, 1947.



[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME  
TO FILE RECORD AND DOCKET CAUSE

Comes now the defendant through his attorneys of record and respectfully moves this court for an order extending time to file record on appeal and to docket the cause of action until the 4th day of February, 1948, on the ground and for the reason that the transcript of testimony has not yet been delivered to the defendant by the reporter of the above entitled court; that the remaining time to file record and docket cause is insufficient to afford the defendant an ample opportunity to read and review the transcript of testimony and to complete the filing and docketing thereof.

This motion is made upon all the records and files herein and upon the stipulation of the parties hereto.

GAGLIARDI, URSICH &  
GAGLIARDI,  
/s/ FRANK HALE,  
Attorneys for Defendant.

[Endorsed]: Filed December 29, 1947.

[Title of District Court and Cause.]

### ORDER

This matter coming up regularly before this court for an order extending time to file record and docket cause upon the motion of the defendant and the stipulation of the above entitled parties; and it appearing to the court that good cause has been shown for the extension of time; and it further appearing that forty (40) days has not elapsed since the filing of the Notice of Appeal;

Now, therefore, it is hereby ordered that the time for the defendant to file record on appeal and docket cause of action be and the same is hereby extended to and including February 4, 1948.

Done in open court this 29th day of December, 1947.

/s/ CHARLES H. LEAVY,  
United States District Judge.

Presented by:

/s/ A. M. URSICH,  
Of Attorneys for Defendant.

/s/ GEORGE T. GAGLIARDI.

Approved:

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ HARRY SAGER,  
Asst. United States Attorney.

[Endorsed]: Filed December 29, 1947.

[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated and agreed by and between the above named defendant, through his attorneys of record, and the plaintiff, through its attorneys, that all of the original exhibits by the plaintiff and the defendant in the trial of the above entitled cause, whether the same were admitted or received in evidence, be forwarded by the Clerk of the above entitled Court in their original state to the Circuit Court of Appeals for the Ninth Circuit as a part of and with the Transcript of Record on Appeal.

/s/ J. CHARLES DENNIS,

United States Attorney,

/s/ HARRY SAGER,

Asst. United States Attorney,

Attorneys for Plaintiff.

GAGLIARDI, URSICH &

GAGLIARDI,

/s/ FRANK HALE,

Attorneys for Defendant.

[Endorsed: Filed December 29, 1947.]

[Title of District Court and Cause.]

MOTION FOR ORDER TO FORWARD ORIGINAL RECORDS WITH TRANSCRIPT OF RECORD

Comes now the defendant above named and through his attorneys respectfully moves the court for an order directing that all of the exhibits of the plaintiff and the defendant offered in evidence at the trial of the above entitled cause, whether or not the same were received in evidence, be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit by the Clerk of the above entitled court in their original state as offered, as a part of and with the Transcript of Record on Appeal.

GAGLIARDI, URSICH &  
GAGLIARDI,

/s/ FRANK HALE,

Attorneys for Defendant.

[Endorsed]: Filed December 29, 1947.

[Title of District Court and Cause.]

ORDER TO FORWARD ORIGINAL EXHIBITS WITH TRANSCRIPT OF RECORD ON APPEAL

This matter coming on for hearing upon the motion of the defendant above named, by and through his attorneys, and the court being advised in the premises;

It is now ordered that all of the original exhibits offered in evidence by the plaintiff and the defendant at the trial of the above entitled cause, whether or not the same were admitted or received in evidence, be forwarded by the Clerk of the above entitled court in their original state to the Circuit Court of Appeals for the Ninth Circuit as a part of and with the Transcript of Record on Appeal.

Done in open court this 29th day of December, 1947.

/s/ CHARLES H. LEAVY,

United States District Judge.

Presented by:

/s/ A. M. URSICH,

/s/ GEORGE T. GAGLIARDI.

Of Attorneys for Defendant.

[Endorsed]: Filed December 29, 1947.

[Title of District Court and Cause.]

### BAIL BOND ON APPEAL

Know All Men by These Presents:

That I, John Barcott, as principal, have deposited the sum of Two Thousand Five Hundred Dollars (\$2,500.00) in cash with the Clerk of the United States District Court, Southern Division, Tacoma, Washington, for bail on appeal, and am held firmly bound unto the United States of America in the full and just sum of Two Thousand Five Hundred Dollars (\$2,500.00), to be paid to the United States of America, to which payments, well and truly to be paid, I bind myself, my heirs, executors, administrators, successors and assigns, and the said sum of Two Thousand Five Hundred Dollars (\$2,500.00), entirely by these presents.

Sealed hereinbelow with my seal and dated this 16th day of January, 1948.

Whereas, in the District Court of the United States for the Western District of Washington, Southern Division, in the case pending in said court between the United States of America, as plaintiff, and John Barcott, as defendant, being numbered 15845 of the records of the office of the clerk of said court, the Jury returned a verdict of guilty against the said John Barcott, adjudging him guilty as charged on Counts I, II and III in the Indictment in said cause, charging him with violation of 26 USC 145(b) (Income Tax evasion), and the rules and regulations thereto; and



Whereas, the said John Barcott was thereafter on the 24th day of November, 1947, duly sentenced by the court to the custody of the Attorney General of the United States, to be confined in some penitentiary designated by the Attorney General for the period of ten months, and that he pay to the United States of America the sum of \$750.00 on each of said counts, making a total fine of \$2,250.00, and that he pay the costs of prosecution to be taxed, and that formal judgment and sentence having been filed in the office of the clerk of the above entitled court against the said John Barcott; and

Whereas, the said John Barcott, principal herein, desires to appeal from such judgment and sentence so rendered in the above entitled cause against him, to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said John Barcott, principal, intends to diligently pursue all steps in prosecuting an appeal from the said judgment and sentence;

Now, Therefore, the condition of the above obligation and recognizance is that if the said John Barcott shall personally appear before the United States District Court for the Western District of Washington, Southern Division, in the city of Tacoma, Washington, from day to day and from term to term as may be ordered by the court, and then and there obey the judgment of said court and not depart from the jurisdiction of said court without leave therefrom; and shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco.

California, or such city as shall be designated by the said court for the hearing of said appeal, on such day or days as may be appointed therefor, and shall diligently prosecute the said appeal and abide by and obey all the orders of the said United States Circuit Court of Appeals in said cause and shall surrender himself in execution of the judgment or sentence appealed from, if said judgment and sentence be affirmed or the writ of error on appeal be dismissed; and if he shall appear for the trial in the District Court for the Western District of Washington, Southern Division, on such day or days as may be appointed for a retrial of said cause, and shall abide by and obey all orders made by said court and render himself in execution of the judgment of said court, then the above obligation to be void; otherwise to be and remain in full force, virtue and effect.

/s/ JOHN BARCOTT,  
Principal.

State of Washington,  
County of Pierce—ss.

On the 16th day of January, 1948, before me personally appeared John Barcott, to me known to be the individual described in and who executed the foregoing instrument, and on oath stated that he signed the same freely and voluntarily for the uses and purposes therein stated.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal]        /s/ S. A. GAGLIARDI,  
Notary Public in and for the State of Washington,  
residing at Tacoma.

Approved January 16, 1948.

/s/ CHARLES H. LEAVY,  
Judge of the District Court.

/s/ HARRY SAGER,  
Assistant U. S. District  
Attorney.

[Endorsed]: Filed January 16, 1948.

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Comes now the defendant above named and hereby designates that the following listed portions of the record, proceedings and evidence be contained in and made a part of the record on appeal in the above entitled cause, to-wit:

1. Indictment
2. Court Appearance Bond
3. Motion to Dismiss Indictment
4. Motion for Bill of Particulars
5. Court Order of May 28, 1947, authorizing filing of Motion to Dismiss
6. Bill of Particulars

7. Verdict of Jury
8. All of Plaintiff's Requested Instructions
9. All of Defendant's Requested Instructions
10. Instruction No. 8 containing notation of Court in pencil, "given in part—refused in part. C.H.L."
11. Defendant's Motion for Judgment of Acquittal or in the Alternative for a New Trial
12. Judgment and Sentence
13. Notice of Appeal
14. Stipulation to Extend Time in Which to File Record on Appeal
15. Motion for Order Extending Time to File Record and Docket Cause
16. Court Order of December 29, 1947, Extending Time to File Record and Docket Cause
17. Stipulation to Forward Original Exhibits
18. Motion for Order to Forward Original Records of the Transcript of Record
19. Court Order of December 29, 1947, to Forward Original Exhibits with Transcript of Record on Appeal
20. Bail Bond on Appeal
21. Reporter's entire transcript of testimony and proceedings
22. Transcript of all Docket entries
23. Journal record covering following dates:
  - May 19, 1947
  - September 25, 1947
  - October 30, 1947
  - October 31, 1947

November 3, 1947

November 24, 1947

24. This Designation of Portions of Record to be Contained in Record on Appeal
25. All exhibits offered or received in evidence.

GAGLIARDI, URSICH &  
GAGLIARDI and  
FRANK HALE,  
Attorneys for Defendant.

Receipt of true copy of within and foregoing Designation hereby acknowledged this 19th day of January, 1948, at Tacoma, Wash.

/s/ J. CHARLES DENNIS,  
United States Atty.  
D. Bryant.

[Endorsed]: Filed Jan. 19, 1948.

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[Title of District Court and Cause.]

TRANSCRIPT OF DOCKET ENTRIES :

1947

- May 13—Filed Indictment—(Cash bail, \$2500)  
May 13—Ent. order for B.W., bail set at \$2500  
May 13—Issued B.W.  
May 14—Filed Bond (\$2500 cash)  
May 14—Ent. order Indict. published  
May 14—For Arr. May 15  
May 14—Filed Ret. B.W.

1947

May 15—Arr. passed to 5/19

May 19—Deft. in Court with Counsel

Ent. arr. &amp; plea "Not Guilty"—Set for trial June 24

May 28—Filed Mot. Dis. Indict.

May 28—Filed Motion for Bill of Particulars

May 28—Filed &amp; Ent. Order authoriz. filing Mot. Dis.

July 1—Trial Oct. 14—Jury

Sept. 24—Filed Pltf's Memo. on Deft's Mot. for Bill of Part.

Sept. 25—Ent. rec. hear. Deft's Mot. for Bill of Partic. &amp; Mot. to Dis. Indict.—Mot. Dis. den.; Mot. for Bill of Partic. allowed; on Court's Motion trial reset for Oct. 30

Sept. 30—Filed Bills of Particulars

Oct. 23—Filed Praeipie U. S.—Issued Subp. d. t. (5)

Oct. 24—Order for issuance subp. ret'ble on 10/29

Oct. 24—Filed 2 Praeipie U. S.—Issued 1 Subp. d. t. &amp; 2 subp.

Oct. 28—Filed 2 Praeipie U. S.—Issued 2 Subp. d. t.

Oct. 29—Filed Marshal's Return—2 Subp. d. t.

Oct. 30—Filed Marshal's Return—7 Subp. d. t.

Oct. 30—Ent. record trial commenced (jury)

Oct. 31—Ent. record trial resumed—Filed Ret. Subp.

Nov. 3—Ent. record trial resumed

Nov. 3—Filed &amp; Ent. Verdict "Guilty Cts. 1, 2 &amp; 3"



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- Nov. 3—Deft. enlarged present bail pend. Mot.  
New Trial
- Nov. 3—Filed Pltf's Requested Instructions —  
Deft's Requested Inst. (2)
- Nov. 5—Filed Mot., deft. for Judgm. of Acquittal,  
or alt., Mot. New Trial
- Nov. 17—Ent. Order, Mot. deft. counsel, Mot. New  
Trial passed to 11/24
- Nov. 24—Deft. in Court with Counsel  
Ent. record hearing Mot. for Directed  
Verdict & for New Trial—denied
- Nov. 24—Filed & Ent. Judgment & Sentence: 10  
mos. impris. (concur. on Cts. 1, 2 & 3);  
fine \$750 on each of Cts. 1, 2 & 3
- Nov. 25—Filed Notice of Appeal
- Nov. 26—Cert. cop. Notice of Appeal & Statement  
of Docket Entries sent CCA. Notice of  
above sent counsel & Judge
- Dec. 2—Filed Cost Bill, U. S. (\$125.34)
- Dec. 27—Filed Stip. ext. time file appeal—Filed  
Mot. ext. time (to 2/4/48)
- Dec. 27—Filed Stip. transmit orig. exh.—Mot.—  
Order transmit. orig. exhs.
- Dec. 31—Filed Reporter's Transcript (2 copies filed  
1/19/48 for appeal)

1948

- Jan. 16—Filed Bail bond on appeal (\$2500 cash)
- Jan. 19—Filed Deft's Designation of Contents of  
Record on Appeal

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing transcript, consisting of pages numbered 1 to 59, inclusive, together with the original Reporter's Transcript of Testimony and Proceedings, consisting of pages numbered 1 to 523, inclusive, and Plaintiff's original exhibits numbered 1 to 12 and 14 to 21, inclusive, and Defendant's original exhibits numbered A-1, A-2 and A-3, is a full, true and correct record of so much of the papers and proceedings in Cause No. 15845, United States of America, Plaintiff, vs. John Barcott, Defendant, as required by Defendant's Designation of the Contents of Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment and Sentence of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the original Transcript of Testimony and Proceedings and the original exhibits above referred to have this day been transmitted to the said Circuit Court of Appeals.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the said Record on Appeal, to-wit:

Appeal fee .....	\$ 5.00
Clerk's fee for preparation of Record on Appeal .....	20.00
	<hr/>
	\$25.00

and I further certify that the said fees, as above set out, have been paid in full.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the said Court, in the City of Tacoma, in the Western District of Washington, this 26th day of January, 1948.

[Seal]

MILLARD P. THOMAS,  
Clerk,

By /s/ E. E. REDMAYNE,  
Deputy.

In the District Court of the United States for the  
Western District of Washington, Southern  
Division

No. 15845

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BARCOTT,

Defendant.

### TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 30th day of October, 1947, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States at Tacoma, Pierce County, and State of Washington; the plaintiff appearing by Allan Pomeroy, Assistant United States Attorney, and the defendant appearing in person and by Messrs. S. A. Gagliardi and Anthony M. Ursich of Gagliardi, Ursich & Gagliardi, and Frank Hale; both sides having announced they were ready for trial, a jury was duly empaneled and sworn to try the cause; and

Whereupon, the following proceedings were had and done, to-wit: [4\*]

Mr. Pomeroy: If the Court please, counsel, ladies and gentlemen of the jury, I noticed at the

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\* Page numbering appearing at foot of page of Reporter's certified Transcript of Record.

time that the Court was giving questions to you that practically none of your had any jury experience.

So at this time I would like to say that the attorneys are given the opportunity at the opening of the case to outline to you what they think the evidence will show, and how they hope to prove their side of the case. And at this time the Government has the privilege of making what we term an opening statement. And in this statement I hope to advise you of what I think the Government witnesses will testify to, and so that you may be looking for those things in the testimony and refer back to the indictment.

Now, as the Court explained to you, an indictment was returned by a grand jury in this case. Now this indictment—the original indictment will go to the jury room with you. It is not evidence in itself. However, it is only the paper charge upon which the Government charges a man with a crime; and it is the burden of the Government to prove beyond a reasonable doubt all of the material allegations of that indictment.

And so, in order to inform you now of what the witnesses will be testifying about and what [5] this case is about, I would like to briefly recite to you what this indictment charges the defendant is guilty of.

There are three counts in the indictment. And these three counts refer to three different years. It's charged in count one that "on or about the 12th day of February, 1944, at Tacoma, Washing-

ton, John Barcott, who was married during the calendar year of 1943 and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income and victory tax due and owing by him to the United States of America for the calendar year of 1943, by filing and causing to be filed with the Collector of Internal Revenue at Tacoma, Washington, a false and fraudulent income and victory tax return, wherein he stated that his net income for said calendar year, computed on the community property basis,"—that is that—you will find is true during all three counts, that is, 1943, 1944 and 1945, that he took his net income and then divided it between John Barcott and Katie Barcott, his wife, so that his income was computed on the community property basis, that is, he reported half of it and his wife reported half of it. His wife's returns are not an issue in this case at all; it is only John Barcott's [6] returns. And he stated in this particular return, in the first count, "that his income was the sum of \$6,720.40, and that the amount of tax due and owing thereon was the sum of \$1,545, and some cents; whereas, as he then and there well knew, his net income for the said calendar year computed on the community property basis was the sum of \$12,406.33, derived as follows: that is, in his gross income he received dividends in the sum of \$140, plus interest in the sum of \$141.93, interest on bonds in the sum of \$200, income from business \$24,621.96, making a total of \$25,103.89. The deductions, contributions



he made of \$200, taxes of \$91.23, making a total of \$291.23 in deductions, leaving him a net income of \$24,812.66 of which his one-half community share was \$12,000—about—\$12,406.33, upon which said net income he owed to the United States of America an income and victory tax of \$3,645—forty-six dollars and twenty-five cents.”

Now that is the sum and substance, the material facts of count one. Now count—and deals with the calendar year of 1943. Count two charges, using practically the same language, a violation on the 13th day of February, 1945, at Tacoma, of a violation of filing an income tax for the calendar year of 1944, in which he [7] stated that his net income was \$5,632.57; whereas the Government's charge is that his net income was \$9,926.61, still bearing in mind that is half of the community income.

Count three charges the same thing for the year 1945, that is, the calendar year 1945, when he reported the sum of \$7,388.98; whereas, the Government charges that his income was, his share was \$11,138.92, which is half of the community income of the parties.

This case, when it will be—when it is finally presented to you, will be classed what we term a case proven by the net worth process; that is, in finding out what a man owns at the beginning of any particular year and then checking that against what he owns at the end of that particular year, and by that deducting from it what his expenses or what other income he may have had to find what his true income is; that is, a man has so much at the begin-

ning of the year and he had so much at the end of the year. And then you give him credit for everything that he can claim in between, and the difference between the net worth at the end of the year and the net worth at the beginning of the year, is what the Government claims his income must have been. [8]

The first witness for the Government will be a Special Agent for the Internal Revenue Service, and his testimony, I believe, will show you that he received the information that the—John Barcott had gone to the bank and traded a whole bunch of small denominational bills for ten one-thousand-dollar bills, which was—being an unusual transaction, he was sent to check on John Barcott about.

And so he went to see John Barcott and was told by John Barcott that it was his custom to save up small denomination bills and then to purchase United States Savings Bonds with these bills, his main business being the California Oyster House here in the City of Tacoma. And he said that the reason he had taken—gotten the cash of ten one-thousand-dollar bills was because he was going to make a loan to someone and that was the purpose of changing the bills into these ten one-thousand-dollar bills.

He was asked at that time if he had any objection to the Special Agent for—of the Revenue Service of showing him what he had in the way of these bonds and these bills, and he said no, that he kept everything in a safe deposit box and he would

take the [9] agent down there. So, the agent went down to the safe deposit box with Mr. Barcott. The money—the cash money was not in the safe deposit box, but he had it in an envelope—in two envelopes in his pocket, and the safe deposit box was then inventoried by the Special Agent for the Revenue Service, Mr. Neilson.

And in this safe deposit box was found some seventy-four or seventy-five thousand dollars worth of United States Savings Bonds, all of which, or most of which had been purchased in the past three years. This conversation of which I am telling you now, took place in the early part of 1946. And when the money counted in the envelope—was counted in the envelope, it was found that it was twenty-thousand dollars instead of ten-thousand dollars, and Mr. Barcott told the agent at that time that he didn't understand that, that he thought it was only ten thousand but he had twenty thousand dollars in one-thousand-dollar bills.

So the total amount that was then left in the box when the agent and Mr. Barcott left there, was the sum of—there was three thousand dollars more besides that in small denomination bills, so that's twenty-three thousand dollars in cash and some [10] seventy-four or seventy-five thousand dollars in United States Savings Bonds.

Then, after a report was made back to the Internal Revenue Service, Mr. Swanson was notified concerning this matter and was to audit the account of Mr. Barcott: and some few days later Mr. Swan-

son and Mr. Neilson together saw Mr. Barcott and again went and checked the contents of this safe deposit box, at which time Mr. Barcott told them, upon questioning, that he—yes, he had another safe deposit box over in another place. So they then went over to this other safe deposit box and found that there was nothing in this other safe deposit box except business papers, that is, insurance papers on his business properties.

The other witnesses are people who will come in and bring in certain records, that is, records of his savings accounts at the National Bank of Washington, his checking accounts, the records of entry into the safe deposit box there at the National Bank of Washington, a real estate contract, and a conditional sales contract that Mr. Barcott owned.

Also, there will be a witness who will testify as to dividends that he received from the Fishermen's Packing Corporation stock, which he owned, [11] of some fourteen hundred dollars. Then there will be an insurance man who will testify as to some two hundred and thirty dollars worth of—I think it is two hundred and thirty dollars a year premiums he paid on life insurance policies.

Then Mr. Swanson will take the stand, and Mr. Swanson will compute for you, showing the method by which we arrive at how much a man's tax should be.

Now briefly, after you get all this information in, the testimony will show that in computing the figures which I read to you in the indictment, nothing was charged against him for the \$23,000 in cash.

That was given to him as if he had saved that for a long period of years, and so he is not charged with any part of the \$23,000 in cash which he had in this box at the time that it was checked by the Internal Revenue Service.

His savings account at the National Bank of Washington, which went from \$2,279.53 in 194—December 31, 1942, to \$3,629.03 in—on December 31, 1945, shows an increase of some fifteen—fourteen hundred dollars. His checking account for the California Oyster House account, that's the main [12] business that he had, was merely used to pay out about three accounts, and this account averaged about a thousand dollars all the way through this whole period of time. He didn't use the checking account a great deal, except I think he paid three accounts out of the store out of this thousand dol—or this checking account.

And that's been about the same all the way through, the records will show that his checking account remained the same, about a thousand dollars.

But, his purchase of United States Savings Bonds increased materially, so that we find that on December 31, 1942, he owned fourteen thousand four hundred and fifty dollars worth of United States Savings Bonds, and that is not the face value of these bonds but that is the cost value, that is the value of what it cost him to purchase them. A year later, December 31, 1943, he owned thirty-five thousand two hundred dollars worth of United States



Savings Bonds, an increase of some nineteen thousand dollars, or twenty thousand seven hundred and fifty dollars. A year later, December 31, 1944, he owned fifty-four thousand two hundred dollars, an increase of some nineteen thousand dollars in United States Savings Bonds. [13] And on December 31, 1945, he owned seventy-four thousand two hundred dollars worth of savings bonds, and I believe the evidence will also show that in this check-up there was a five-thousand-dollar bond missing which is not in the indictment, but this five-thousand-dollar bond is not charged against him, which he still has, and so it should be twenty-five thousand dollars more for the last year.

And that is the main part of our charges, that this shows the income that he actually made during this period of time.

The real estate contract is credited to him, a real estate contract which was being collected by the National Bank of Washington, which at the beginning of the period, December 31, 1942, amounted to \$1,596.35, and at the end of the period was down to \$1,039.83; in other words the collection on that was some maybe five or six hundred dollars down from where it was, including interest.

There was a conditional sales contract which was also being collected by the National Bank of Washington for him; starting on December 31, 1942, the amount due and owing at that time was \$494.73, and at December 31, 1945, there was a balance due and owing [14] of some \$65.99. So that amount, some



three hundred dollars—four hundred dollars was—four hundred and some dollars was paid during this period of time and he was given credit for that.

In computing the net worth we—everything was—we attempted to put everything in and I think the evidence will show that he has a home and furnishings, the same home and furnishings that he had at the beginning of the period of time, and that was valued at \$8,000 and it was valued at \$8,000 right straight through, so that doesn't change the result either.

The business fixtures were charged—we took his own figures on the business fixtures. They were, December 31, 1942, of \$3,815.90, and then he says himself that he increased that \$1,109, so he was given credit for having spent \$1,109 for business fixtures.

He was given credit for the Fishermen's Packing Corporation stock which he owned, of some fourteen hundred dollars. That remains the same. He had that all during the period of time.

Then he owns Lots 3 and 4 of Block 9729, of Tacoma Sixth Addition, which were valued at \$3,150 at the beginning of the time, and the same value at the end of the time. So that in no way affects the proposition. [15]

Then he purchased for \$750, Lots 19 and 20 in another block, and sold it during the time, so he was given credit on the \$750, making his total assets jump from the beginning of the indictment, \$59,186, till the end of the time of indictment of \$120,409.75.

That of course is broken down and will be broken down for you by the Revenue Agent into years, that is, during—his total assets at the beginning of the period, \$59,186.51; at the end of the first year his assets were \$81,933.24; and at the end of the next year was \$101,063.41; and at the end of the period, December 31, 1945, was \$120,409.75.

Then he was given a credit, less reserve for depreciation, which he put in, and we took his figures on that. So that in no way affects the original statement that I made.

To this was added his life insurance premiums paid, and his Federal income tax paid as he reported it and as he paid it. So that we arrived at the figures which I read to you from the indictment; and as the evidence will—is shown to you, there were no charges then made for any living expenses whatever. I mean, it cost him nothing to live during this period of time. If those were figured in, why it would be more. But, he was not charged with any of those things whatever. [16]

And after these facts are given to you, the Government is then asking for you to bring in a verdict of guilty on all three counts of this indictment.

The Court: Do you desire to make your opening statement now, Mr. Ursieh?

Mr. Ursieh: No, your Honor, we will reserve it until later.

The Court: You may call your first witness.

Mr. Pomeroy: Mr. Nielsen. [17]

STANLEY NIELSEN

produced as a witness on behalf of the Government, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Stanley Nielsen.

The Court: What is your first name again?

The Witness: Stanley.

Q. You may spell it for the Court.

A. S-t-a-n-l-e-y.

Q. I mean your last name.

A. N-i-e-l-s-e-n.

Q. And what is your occupation, Mr. Nielsen?

A. I am employed by the Bureau of Internal Revenue as a special agent in the Intelligence unit.

Q. And how long have you worked for the Government?      A. About five years.

Q. Do you know John Barcott, the defendant in this case?      A. Yes, I do.

Q. When did you first become acquainted with him?      A. January 28th, 1946.

Q. And what was the occasion of that date?

A. I called Mr. Barcott to discuss an official assignment [18] that I had concerning a cash transaction, wherein he purchased ten thousand one-dollar bills, with bills of ordinary denomination.

Q. Did you then have a meeting with Mr. Barcott?      A. I did.

(Testimony of Stanley Nielsen.)

Q. Where was that meeting?

A. At room 1700 Puget Sound National Bank Building.

Q. He came there in response to your call?

A. That's right.

Q. And did you discuss this matter with him?

A. I did.

Q. Just state what that discussion was.

A. I told Mr. Barcott the purpose of investigating such transactions was to determine if the money was used in black market activities, and if the money was properly reported for income tax purposes, and he said "Well," he said, "I have always filed income tax returns in the operation of my restaurant, and I ordinarily accumulate five or six thousand dollars, and purchase United States Savings bonds," but the particular transaction we were talking about, he said "I accumulated the ten thousand dollars to make a loan to a friend who is going to buy a boat, one Mike Kazulan. However, the transaction did not materialize so I now I have the ten thousand dollars."

Q. Then what happened? And what was said?

A. He said that: "If you wish I will show you the ten thousand dollars and the bonds that I have, to show you that I am telling you the truth about this matter." I asked him where he kept the bonds and the money, and he said "In the safe deposit box, and if you want to meet me down at the bank, I'll get the key and take you down and show it to you," so I agreed to that, and we met at the bank—

(Testimony of Stanley Nielsen.)

proceeded down to the bank, to the vault, and where he obtained the box.

Q. Just you and he were together, is that right?

A. That's right.

Q. All right. Then you went down to the safe deposit box, and what occurred down there?

A. We went into the vault and he obtained his safe deposit box and we retired to a small room where he placed the box on the table and opened it.

Q. Then what happened?

A. Then he placed two packages of bills near the box—near the open end of the box, and he said “Nielsen, this is the money that we have been talking about.”

Q. Where did he take the package—or the money? Was that from the box, or where did he have it?

A. He didn't take it from the box. He removed it from his person.

Q. Two envelopes, were there? [20]

A. No, there were two packages, with a rubber binder around each.

Q. Did you inventory those two packages?

A. I did.

Q. And what was in those two packages?

A. They were marked in large letters five thousand, each. The packages each contained ten one thousand dollar bills.

Q. In other words they were marked five thousand each, but they each contained ten thousand dollars?

A. That's right.

(Testimony of Stanley Nielsen.)

Q. The two packages then contained twenty thousand dollars, in one-thousand dollar bills?

A. That's right.

Q. And what else did you—did you further inventory the box at that time?

A. Yes. When I observed the twenty thousand dollars, I said, "Barcott there is twenty thousand in place of ten," and he said, "Well," he said, "I must have made a mistake." Then I continued to inventory the contents of the box. It contained six packages of currency, five hundred dollars in each in ordinary denomination.

Q. How much was that in cash, then?

A. Three thousand dollars.

Q. Three thousand dollars. There was twenty-three thousand dollars in cash, is that correct? [21]

A. That's right.

Q. What else did you see there?

A. The box had bonds in it, and I began to inventory the bonds.

Q. Did you inventory the bonds? A. Yes.

Q. Did you make a list of these bonds?

A. I did.

Q. And how much did they amount to, the bonds that you inventoried in that box?

A. As I recall, about seventy-five thousand dollars.

Q. That was the face value of the bonds?

A. Yes.



(Testimony of Stanley Nielsen.)

Q. And tell what other conversation if any took place while you were there?

A. While I was counting the currency, Barcott said, "Here, Nielsen"—that was when I was counting the three thousand dollars—the six packages containing five hundred each, "Here, Nielsen, let me give you one of these, you——"

Mr. Ursich: Your Honor, please—just a moment. I would like to interrupt the witness and ask that an offer of proof be made in this regard to the Court in the absence of the jury, on some information that we have learned from the agents, we anticipate that it may be a matter that may be prejudicial at this time. [22]

The Court: No, I shall deny your offer at this time. If you want to challenge the relevancy of the testimony the witness has to give, you may do so.

Mr. Pomeroy: Read the last question.

The Reporter: "Q. And tell what other conversation if any took place while you were there. Answer: While I was counting the currency, Barcott said, 'Here, Nielsen'—that was when I was counting the three thousand dollars, the six packages containing five hundred each, 'Here, Nielsen, let me give you one of these——'" and you were interrupted.

The Witness: That's right. Barcott said, "Here Nielsen, let me give you one of these," and pushing a package of currency containing five hundred dollars to me, and, "You make a favorable report on this matter and just forget about the whole thing," and I told him, "No, Mr. Barcott, I can't do

(Testimony of Stanley Nielsen.)

that. I must inventory this stuff," so I continued to inventory the bonds.

Then he approached me again. He said, "Now, Nielsen," he said, "—we are alone—only two of us." He said, "Can't you take a package of this and make a favorable report on it?" I said, "No. By your actions you are practically walking into jail. It is my duty to inventory this now," so I continued and inventoried it and he approached me again, and he said, "I feel sick inside." [23] He said, "Let me buy you a suit of clothes, and your wife a fur coat, and you take this money and make a favorable report on me." I again told him that I couldn't and wouldn't accept anything from him, and continued inventorying the bonds. After the inventory I told him, "Now," I said, "replace your possessions—your bonds and your cash and miscellaneous papers in your box and put them back in the vault." He picked up two handfuls of currency and got in front of me, and he said, "For God's sake, take some of this, so that I can sleep nights." I said, "No, I can't take any of it. Put it back in your box, and put your box back in your vault. If we desire further information on this matter, why we will contact you again, and just go on about your business," which he done. He left the vault. He returned the box to the vault, and we walked out of the bank together.

Q. When did you next see Mr. Barcott?

Mr. Ursich: Your Honor please, at this time I am asking that that testimony be stricken and the jury instructed to disregard it, on the grounds and

(Testimony of Stanley Nielsen.)

for the reason that the matter is irrelevant to the trial of the issues in his case.

There has been no proper predicate laid for its introduction. Furthermore, there has been no evidence—no corpus of any kind committed here. The only purpose for [24] which it can be offered is to prejudice the minds of the jury against the defendant at this time.

The Court: The objection will be overruled, and motion denied.

Q. When did you next see Mr. Barcott?

A. I believe it was on February 13th.

Q. And of what year was that? A. Of '46.

Q. And what was the occasion of that visit?

A. Mr. Swanson, Revenue agent, had been officially assigned to make an audit in this matter, and we again called Mr. Barcott, and he came to Swanson's office and discussed the matter with him.

Q. And did you have a conversation with him at that time? A. Yes, we did.

Q. Where did you go after you had this discussion with him in Swanson's office?

A. Barcott agreed to show us the contents of his safe deposit box for re-inventory, and Swanson, Barcott and myself went down to the box and re-inventoried it.

Q. Did the box have the same contents on this occasion as it had on the occasion in which you had inventoried it before?

A. Yes. That was verified by Mr. Barcott and Mr. Swanson.

(Testimony of Stanley Nielsen.)

Q. Was there then a conversation concerning another safe [25] deposit box?

A. There was.

Q. And what was that conversation?

A. We asked him if he had another safe deposit box, and he said yes, he had one with the Washington—at the Washington Building.

Q. And what occurred then?

A. We went over to the Washington Building, and he made available the contents of that box.

Q. And what was in that box?

A. Some miscellaneous insurance papers—insurance on his business, the California Oyster House.

Q. No cash or bonds?

A. That's right, no cash there.

Q. What was the date of this first occasion you went to this National Bank of Washington box?

A. Barcott and I?

Q. Yes. A. It was January 28th, 1946.

Q. January 28th, and the second occasion was February the 13th, is that correct?

A. That's right, I believe.

Mr. Pomeroy: You may inquire. [26]

#### Cross-Examination

By Mr. Ursich:

Q. Mr. Nielsen, you say you saw Mr. Barcott for the first time on the 28th of January in 1946?

A. I believe that is right, sir.

(Testimony of Stanley Nielsen.)

Q. He came over to your office at your request, is that right?

A. I think I called at his place of business just prior to that, and left the telephone number where he could reach me, as near as I recall, and I believe that he called me. It might have been that I called him. I don't remember exactly.

Q. But any way, he came up there at the request of the Internal Revenue, is that correct.

A. Yes.

Q. At that time you informed him you had some knowledge about ten thousand dollars that he had received from one of the banks, is that right?

A. That's right.

Q. Did he deny that fact at all?

A. He did not.

Q. And you told him you were investigating that ten thousand dollars with reference to Internal Revenue matters, black market or some similar matter?

A. Uh-huh. [27]

Q. Did you at that time ask him where that money was?

A. I think he voluntarily told me, as I recall it.

Q. Would you want to say for sure that that was the way, or could you have been mistaken on that?

A. I recall of asking if he had the money.

Q. Do you remember asking him whether or not you could see where the money was?

A. I don't believe that I did. I would say "no" to that.

(Testimony of Stanley Nielsen.)

Q. In other words, this was voluntary, according to your testimony, by Mr. Barcott?

A. That's right.

Q. And he didn't make any effort at that time to conceal any of his transactions?

A. No, he didn't.

Q. He told you he had the box, and he said it was down there? A. Yes.

Q. And all these assets were there. That was purely voluntary on his part, is that right?

A. That is correct.

Q. Now all this occurred on the 28th. How long was he in your office before he left to get the key for the box?

A. I think, as near as I can recall, he came there about 10:00 or 10:30 in the morning, and after having been down to the bank, I know by the time I got back to the [28] Revenue agents' office it was 12:35.

Q. And he was up there how long then, would you estimate? A. Probably 45 minutes.

Q. About that time, and you informed him—or the purpose of your interview was to inquire into the ten one-thousand dollar bills?

A. I told Mr. Barcott the purpose of the interview—of investigating such transactions, was to determine if they were in any way connected with black market activities or income tax evasions.

Q. At that time. A. Yes, sir.



(Testimony of Stanley Nielsen.)

Q. And there wasn't any attempt made on his part to conceal this or deny it. He told you that it was true. He told you where you could go and see it?

A. Yes, that's right.

Q. Had you advised Mr. Barcott at that time he didn't have to show you the box if he didn't want to? A. I did, yes.

Q. And notwithstanding that fact he insisted on showing you——

A. That's right, he said, "I will show you that I am telling the truth."

Q. Now you wouldn't have had any right to go into that box without his permission, would you?

Mr. Pomeroy: I will object to that, if the [29] Court please, as calling for——

Q. In your conversations with Mr. Barcott how did you find his use of the English language? Would you say that he spoke well, or would you say he was difficult to understand?

A. He spoke well enough for me to understand him.

Q. He spoke well enough. Did he speak broken, or did he not speak broken?

A. I will say that he speaks a little bit broken.

Q. A little broken?

A. He can carry on an intelligent conversation.

Q. I am referring to his actual use of the English language. He spoke with a definite broken accent, is that right?

A. Some words probably broken; some of them rather clear. I am not a language expert.

(Testimony of Stanley Nielsen.)

Q. I understand that. You say then that you had no difficulty?

A. Well, I can understand the English language, yes.

Q. And you had no difficulty at all, in understanding him?

A. Well, no, I would say that I didn't have any difficulty in understanding.

Mr. Ursich: No further cross-examination.

Mr. Pomeroy: You may step down.

(Witness excused.) [30]

Mr. Pomeroy: If the Court please, at this time it's close to the noon hour, and I'll have these marked, and I think we can use up this time in getting these exhibits——

The Court: They may be marked.

Mr. Pomeroy: I offer Plaintiff's Exhibits 1, 2, 3, 4, 5, and 6.

The Court: Is there any objection?

Mr. Ursich: No, your Honor, they are properly authenticated, and I see no reason objecting to their introduction if we know what the purpose is.

We have no objection, your Honor, if that covers the testimony that is offered. We will reserve an objection if it is not coupled with testimony, however.

The Court: They will be admitted in evidence with the reservation that has just been made.

(Whereupon, documents referred to were received in evidence and marked Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5 and 6, respectively.)

The Court: Let me ask counsel if you have some matters that you want to present to the Court in the absence of the jury?

Mr. Ursich: Your Honor, please?

The Court: You suggested here when the [31] direct examination of the witness was taking place that you had some objection that you wanted to present in the absence of the jury.

Mr. Ursich: Yes, your Honor, it was with reference to that testimony.

The Court: The jurors will now be excused until 2:00 o'clock this afternoon. It's of great importance that we be prompt in the matter of being here when we reconvene court, so make it a point to get here a little before 2:00 o'clock. You can assemble before you come into court.

The audience will remain seated and the court will remain in session, because I have some other matters to take up.

The jury will be excused.

(Whereupon the jurors retired from the court room.)

Mr. Gagliardi: If your Honor please, at this time the defendant moves the Court to withdraw from the consideration of the jury the testimony given by the witness Nielsen with reference to the attempted bribe, and to instruct the jury to disregard it.

The testimony was highly prejudicial, and yet it did not prove an issue here. We are proving one crime in order to convict the defendant of [32]

another crime. If it was in aid of the proof of the crime the defendant stands charged with, then it would be competent, but that testimony, highly prejudicial, poisoned the mind of the jury and convinced the jury that this man has committed a crime of attempted bribery which is a felony and a severe offense.

Now how are we going to have the jury's mind dissuaded from the poison? We are charged here with having defrauded the government of payment of taxes, and not that we have attempted to bribe an agent of the government, and by the fact that you are proving one crime which is so severe and so poisonous—the very poison will poison any person's mind; when attached to the agent of the government, the jury should be free of that poison, and they should judge this case upon the facts as they are, and that is, they must judge whether or not this defendant reported all his income or he didn't. Even an honest man, not having committed a crime, can make that kind of a mistake by reason of his fear, excitement, and scared in his own condition, and to poison the mind of the jury to bring that testimony. That conversation did not prove either that the defendant had paid or not paid the taxes, except for one purpose, and one purpose alone, and that it was to poison the minds of the jury, and the jury should not be [33] poisoned in that manner. The offense we are charged with here is severe enough without adding another felony on top of it, and if we proceeded further, possibly two or

three other felonies that this defendant may have committed, in order to convict him of non-payment of taxes.

I sincerely say, your Honor, that the testimony was incompetent, highly prejudicial—it was very poisonous and should be withdrawn from the consideration of the jury, and the jury instructed to disregard it.

The Court: The charge here, Mr. Gagliardi, is that the defendant fraudulently sought to evade the payment of his income tax. The evidence is material to such a charge. If, as the government contends he was guilty, it would tend to establish guilty knowledge. If there was an effort made to induce the government agent to refrain in the performance of his duty, the evidence is highly material, and very competent to the issues. Whether the jury believes it or not—and if they do believe it, it still doesn't prove the ultimate fact, but it bears strongly upon the question of fraud that must be established by the government here beyond a reasonable doubt. If this income tax return is false and not fraudulently made, why of course——

Mr. Gagliardi: That is our contention, your [34] Honor, that they must prove first that fraud was committed, and then a guilty conscience of having committed it, it may be offered for that purpose.

The Court: The order of proof would not make the evidence incompetent. Of course, if there is no proof to support the major charge, why the whole case would fall.

Mr. Gagliardi: Well, if your Honor please, the testimony of the witness also was there was two



investigations. One was for the purpose of determining to see whether or not the man had paid all the income tax. The other was, whether or not he was operating a black market. Now which of these crimes was he trying to atone? Was he atoning for a black market, or was he trying to atone the payment of taxes? And there was also the crime of hoarding the money—large bills, which some of us have in mind if they were gold certificates, and yet we are charged here with guilty conscience of having evaded the payment of taxes, when the witness himself has said, “We are investigating possible operations in black marketing,” which was also a crime, or possibly, evading the payment of taxes. Now which of these two was the defendant conscience guilty? Was it the black market, or was the non-payment of taxes, and that’s why I say it is highly prejudicial. We are tried [35] here with three crimes in one indictment, without being segregated—without being charged, as a matter of fact.

The Court: Well, I don’t know of your third crime that you mentioned, Mr. Gagliardi. I know of no public offense being committed by a person for having ten thousand dollars of bills in their possession.

Mr. Gagliardi: Your Honor, there was an edict of the President of the United States where they called all the gold certificates and some of us were ignorant of money and never seen any. We don’t know the difference between gold certificates and large denominations.

The Court: I will have to assume these were not gold certificates. The banks were surely not en-



gaged in handing out gold certificates, because gold certificates have been called in. The question as to whether the defendant thought he was being investigated for black market operation or for a violation of the income tax law is a little more to the point on your contention, but the evidence here is that he was advised this was an Internal Revenue Agent and not an O.P.A. investigator, and in the light of the evidence as to the nature of the inquiry being made at the time by the agent, I shall have to hold that his testimony is [36] relevant and the question is for the jury to determine whether they believe it or not, and whether it tends to establish the fraudulent evasion of income tax as charged in the indictment.

Your motion to strike will have to be denied, Mr. Gagliardi, and an exception allowed.

The court will now be at recess until 2:00 o'clock this afternoon.

(Recess.) [37]

January 20, 1948

2:00 P.M.

### SPARKS WASHBURN

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Pomeroy:

Q. Please state your name.

A. Sparks Washburn, Assistant Cashier of the National Bank of Washington.

(Testimony of Sparks Washburn.)

Q. And as Assistant Cashier, are you custodian of the records there?      A. I am.

Q. May I have the records that you have?

A. You want them all?

Mr. Pomeroy: I was trying to get on to your procedure here, Judge. I didn't know whether he was to take them to the Clerk or not.

The Clerk: Plaintiff's Exhibit No. 7, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 7. Will you please state to the Court what that is, if you know.

A. This is the checking account of the California Oyster [38] House, for the period January 1, '43 through December 31, 1945, taken from our original records and certified.

Q. And, hand them to the defense counsel.

The Clerk: Plaintiff's Exhibit No. 8, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 8. Will you state to the Court what that exhibit is, if you know?

A. This is the savings account of John Barcott, 930 Pacific Avenue, No. 64787, beginning with the date February 9, '37 through October 1, 1947. This is the original record.

The Clerk: Plaintiff's Exhibit No. 9, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 9. Will you explain to the Court what that is, if you know?

(Testimony of Sparks Washburn.)

A. This is the record of two contracts, real estate contracts, a payment record in which Anton Barcott apparently purchased certain property from John Barcott on the real estate contract.

Q. Is there a conditional sales contract there also?

A. Well, the contract, the original conditional sales contract is not here. It's simply recorded. It was [39] part of the original documents.

Q. Is that an original record?

A. Yes, it is.

The Clerk: Plaintiff's Exhibit No. 10, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 10. Will you explain to the Court what that is, if you know?

A. These are original entrance tickets into our safe deposit vaults, Box No. 3064, dated, one of them, January 28, 1946, 10:55 a.m.; and February 13, 1946, 1:34 p.m.; both tickets representing entrance to the box of Mr. Barcott.

Q. Mr. Barcott signed those did he?

A. Yes, he did. Both tickets.

Mr. Pomeroy: If the Court please, at this time I'll offer Plaintiff's Exhibits Nos. 7, 8, 9 and 10. They may say that number seven is a copy of an original, but it was found that there were about thirty-six big volumes that were nailed together at the bank, and it would be necessary to tear these thirty-six big volumes apart in order to bring the originals here, and counsel for the defendants generously agreed that I may bring the copies here.

(Testimony of Sparks Washburn.)

The Court: And these original records of the bank of course will be subject to withdrawal and copies substituted later if necessary, if they are admitted. Do you have any objection to the admission?

Mr. Gagliardi: I would like to ask the witness a few questions before it may be admitted. There may be something else that should be added, your Honor.

Mr. Washburn, referring to Exhibit No. 7, I see the date that you have here, the first bank transaction is January 1st of '43. Is that the inception of open this account, or was this account opened before that date?

The Witness: Oh, it was open long before that.

Mr. Gagliardi: And how long before that was it open?

The Witness: Oh, I think Mr. Barcott has banked with us ever since I've been there. I would say twenty years, anyway.

Mr. Gagliardi: Twenty years. Then this only reflects bank transaction from January 1, '43 to January 1, '46.

The Witness: Well, December 31——

Mr. Gagliardi: December 31st. [41]

The Witness: ——'46.

Mr. Gagliardi: '46.

The Witness: Ah, '45, pardon me.

Mr. Gagliardi: '45.

The Witness: Huh, we'll get it yet.

(Testimony of Sparks Washburn.)

Mr. Gagliardi: I am meaning to say the beginning of the year 1946, it does not include the year.

I object to that, your Honor. If the jury is going to have the benefit of this man's bank transaction, they should have all the record of that bank.

The Court: The objection on that ground will be overruled. If you want to go back a year or two, or three, if they become relevant to the issue. The years involved here are '43, '44, and '45.

Mr. Gagliardi: I realize that, your Honor, but we are charged here with net worth, according to the statement made to the jury. If we can, if the record are there, they should be present—

The Court: I don't care to argue the matter, Mr. Gagliardi. I will give you permission, if you want the witness to produce the record for a number of years preceding. No need of bringing them all, [42] because 20 years ago would have little bearing on what occurred three years ago, or four years ago, but that does not make these documents irrelevant.

Mr. Gagliardi: It seems to me, your Honor, that the—well, I don't want to press my—your Honor has overruled my objection on the ground that it is not a complete record. It is not correct and complete as they are. I am objecting on the ground—

The Court: Objection will be overruled.

Mr. Gagliardi: —and that ground alone. Note an exception.

The Court: Now what about the others?

(Testimony of Sparks Washburn.)

Mr. Gagliardi: Now, turn to exhibit number nine. Does this represent the inception of the open of this account? I refer to the contract, the conditional sale contract.

The Witness: If that's the real estate contract, that's so, yes. Inception of the contract.

Mr. Gagliardi: And the inception of the contract is what date?

The Witness: Well, it was apparently left with us on February the 9th, 1937, both of these real estate contracts.

Mr. Gagliardi: And payable at what monthly rate? [43]

The Witness: Well, let's see, payable at the rate of—the monthly rate—it's apparently not stated, the payments varied.

Mr. Gagliardi: Does that payment show any irregularity of payment on that record, do you have any other record in which you give us more information?

The Witness: On this contract No. 1803B, the amount of each installment was to be ten dollars—let's see—oh yes, and the amount—it's stated here, Mr. Gagliardi, and the—on contract No. 1803A the payments were twenty dollars.

Mr. Gagliardi: Twenty dollars.

The Witness: That's right.

Mr. Gagliardi: Is the payment made steady, or made occasionally, according to the record?

The Witness: They were apparently made pretty close to a schedule on a monthly basis.



(Testimony of Sparks Washburn.)

Mr. Gagliardi: And the bank kept the record. What become of the money as was paid on this contract? Where was it transferred to?

The Witness: Well, on both of these contracts we were instructed to credit Mr. Barcott's savings account.

Mr. Gagliardi: And that is then, exhibit——

The Witness: Number 64787. And these payments are evidenced by certain credit entries on those cards.

Mr. Gagliardi: And that is a contract between John Barcott and Anton Barcott, was it? Do you know who Anton Barcott was?

The Witness: Anton?

Mr. Gagliardi: Yeah.

The Witness: Why, I thought it was his son.

Mr. Gagliardi: We have no objection.

The Court: Do I understand you have no objection?

Mr. Gagliardi: No objection.

The Court: They may be admitted in evidence.

Mr. Pomeroy: That is the original record.

Mr. Gagliardi: Those are original record. I have no objection, you may substitute the original record with a copy, and certify that it be such. However, I will ask him a few more questions before we release the witness this afternoon.

Mr. Pomeroy: Did I understand, your Honor, that you admit all the exhibits? [45]

(Testimony of Sparks Washburn.)

The Court: No, I did not understand whether counsel was withdrawing his objection to 9 and 10, or whether he wanted——

Mr. Gagliardi: No, I only—your Honor, I made no objection to Exhibit No. 7, which is a complete record, according to the testimony of the witness.

(Whereupon a copy of the checking account of the California Oyster House for the period January 1, 1943, through December 31, 1945, and the original record of real estate contract and conditional sales contract of John Barcott at the National Bank of Washington, were admitted in evidence as Plaintiff's Exhibits No. 7 and 9, respectively.)

Mr. Gagliardi: Now, showing you Exhibit No. 8, does that show a complete record of Mr. Barcott's saving account, does it show just merely for a number of years?

The Witness: I think, as I stated before, it shows a complete record.

Mr. Gagliardi: The saving account shows a complete record?

The Witness: Complete record, from the time that he opened it, February the 9th, 1937. [46]

Mr. Gagliardi: Is that the same date that the contract was placed with you for collection?

The Witness: I believe it is. Let me see the record. 2/9/37. That is correct.

Mr. Gagliardi: That's all. No objection.

The Court: It may be admitted in evidence.

(Testimony of Sparks Washburn.)

(Whereupon the original record of the savings account of John Barcott, February 9, 1937, through October 1, 1947, was admitted in evidence as Plaintiff's Exhibit No. 8.)

The Court: Do I understand you have finished your direct examination?

Mr. Pomeroy: After you have passed on the admission of these, I have, your Honor. I understood, you see, that you had admitted all of them. As soon as you pass on the——

The Court: There was one other——

Mr. Gagliardi: We have no objection on this. It may be admitted.

The Court: That's No. 9, is it?

Mr. Gagliardi: No, that's No. 6, I think, isn't it?

Mr. Pomeroy: Ten, your Honor.

Mr. Gagliardi: No. 10. [47]

(Whereupon the original signed entrance tickets to safe deposit box No. 3064, dated January 28, 1946, and February 13, 1946, were admitted in evidence as Plaintiff's Exhibit No. 10.)

Mr. Pomeroy: You may inquire.

#### Cross-Examination

By Mr. Gagliardi:

Q. Mr. Washburn, Mr. Barcott has been a customer of the bank for the last twenty years that you have been there?

A. At least twenty years I would say, yes.

(Testimony of Sparks Washburn.)

Q. You have his checking account and his checking account transaction. You have the record of all his checking account? A. Oh, yes.

Q. From the very beginning. Have you examined that account before you made this copy, or somebody else made the copy for you? [48]

A. Well, naturally, we had one of our trusted employees make the actual transcription.

Q. And you had somebody else make the transcription of this record? A. Yes, sir.

Q. Did you verify then by checking and see whether or not they were properly transcribed?

Mr. Pomeroy: If the Court please, at this time I'll object to this line of questioning, as I thought it was agreed to have been, when this man brought in the copy that he accepted, to relieve the bank of that——

Mr. Gagliardi: I am speaking, you see, of No. 7, the one I made the objection to.

Mr. Pomeroy: That's the one I am talking about. That is the one I thought we agreed to. We wouldn't cause the bank to go to all that difficulty on. Of course, if you are going to question it, why then we would ask the bank to bring the records in. I don't like to have it brought in—brought up now that there may be some inaccuracy in it, because it was only for their convenience that this was done.

Mr. Gagliardi: Let me get to this exhibit, Mr. Clerk, so I may refer to the proper numbers. There will be no confusion as to what I am referring to.

(Testimony of Sparks Washburn.)

Q. Mr. Washburn, I am not questioning Exhibit No. 9, nor do I'm questioning Exhibit No. 8. I am referring merely to Exhibit No. 7, which is the record of the checking account of John E. Barcott. This was a copy—copied from your record?

A. Yes, sir.

Q. That is someone told you that it was a copy.

Mr. Pomeroy: Well, if the Court please, I again have to make my objection to this one the ground that a stipulation was entered into between counsel here that this is a copy and we would accept it as such, that it is a true and accurate copy.

The Court: I understood such was the stipulation.

Mr. Gagliardi: Your Honor, let me make myself clear so we will have no misunderstanding in the matter. I say I have no objection that a copy be substituted. What I want's an accurate copy. I don't want somebody—some small clerk to make a copy and then [50] say, "That is a correct copy." I want this man who is an official of the bank to say that it is. If it is, I want the man who made it. But I have no objection.

The Court: He has testified that it is a copy made under his direction by a trusted bank employee, is that correct?

Mr. Pomeroy: That is correct.

Mr. Gagliardi: Well, that's what I want to find out, your Honor. I don't want, I'm trying to delay the matter.

The Court: Well, that's what he has testified.

(Testimony of Sparks Washburn.)

Q. This was made by somebody under your direction?  
A. Yes sir.

Q. And you examined it to see whether it was correct or not?

A. Well, it has to be correct, Mr. Gagliardi, because the figures are carried forward in subtotals, and any moment that the account appears wrong or different from the original record, it would show a different total. But, the account balanced with the original records all the way through.

Q. You checked that it balanced with the original record?

A. No, no, I didn't take and check each one of them, and a [51] man that's been in the bank twenty-five years, and is one of our valued trusted employees, surely can be trusted to produce the—an accurate record.

Q. Have you examined this record, Mr. Washburn, and compared it with what took place prior to January 1, 1943, as to whether or not the bank transaction were identical the same, in the same manner and to the same extent?

A. I don't understand.

Q. Have you examined the record of the—of your bank in relation to the transaction, the checking account transaction, prior to January 1, 1943?

A. No.

Q. You haven't. So you do not know whether or not the matter of the number of checks were approximately the number of checks, and also the



(Testimony of Sparks Washburn.)

approximate amount of deposit were made prior to January 1, 1943, is the same as made after January 1, 1943?

A. No, I wouldn't. I wouldn't say that I had examined those.

Q. Were those records available?

A. Yes, sir.

Q. And if we need it, you will be able to produce them? Can we subpoena them?

A. We can produce them all right. [52]

Q. Now coming to the contract account, this contract was placed to your bank for collection?

A. Yes, sir.

Q. It was in the collection department?

A. It was—yes.

Q. You don't know whether Mr. Barcott ever saw what record the bank had kept?

A. Well, I presume, but——

Q. Now I don't want any presumption about it now, Sparky. I want if you know——

A. When a real estate contract is left with our bank, we draw out the original record in duplicate, and the duplicate is given to the beneficiary.

Q. But I mean to say, as the collection were made, do you know whether or not Mr. Barcott knew how they were, how proportionate, what portion was a credit to interest and what portion was credited to principal?

A. Oh, yes, we always advised the amount of principal payment and the amount of interest.

(Testimony of Sparks Washburn.)

Q. To the man who pays?

A. No, no, that record is made up in triplicate, one for the payer, one for the beneficiary or the owner of the contract, and one for the permanent bank record.

Q. You mean to tell me the bank gave Mr. Barcott the copy [53] of each payment that was made, showing what payment were made and how they were applied?

A. Yes sir.

Q. Do you know that of your own knowledge?

A. I know that that's our practice. I don't know why it wouldn't have been done in this case.

Q. You are not in charge of the collection department, are you?

A. Well, perhaps as much as in charge of it as anyone, Mr. Gagliardi.

Q. You are in charge——

A. Our duties overlap.

Q. ——of this saving account department, the checking account, aren't you not?

A. It can't be said that I'm in charge of any particular department, because I work in personnel and operations.

Q. This bank account now, been pretty well gone, for long time, wasn't it? According to the record, as the only money deposited was what was paid on this contract.

A. Well, it's quite obvious that most or practically all of those deposits in that savings account are from——

(Testimony of Sparks Washburn.)

Q. The contract.

A. —the contract record, u-huh.

Q. And as the payment were made to the collection department, [54] or to the trust department, they were transferred to the saving account.

A. That's right.

Q. How often would Mr. Barcott come over and bring his saving book to credit his saving book with the money which had been paid on this account?

A. How often would he do that?

Q. Yeah. A. I don't—

Q. If he ever.

A. I don't know if he ever did.

Mr. Gagliardi: Now let me have that exhibit again please.

Q. This amount of money which was shown on deposit, on Exhibit 9, January 1, 1946, was still on the saving account of your bank. Do you know whether or not it has been withdrawn since then?

A. Let me see the record. No, I mean the—there is another exhibit, the savings account record there, I believe. What number is it?

Mr. Gagliardi: Let him see the saving—

The Witness: Now, will you restate your question, Mr.—

Q. Has the money which had been paid on this contract been [55] transferred to the saving account? You answered it had been. Was the money which was deposited in the saving account withdrawn from the saving account prior to January 1, 1945—'46?

A. January 1, 1946?

(Testimony of Sparks Washburn.)

Q. Yes.

A. Well, there are three withdrawals on the account.

Q. Prior to that date? A. Yes.

Q. What date?

A. No—let's see—two. Two prior to that date. The date of the first withdrawal is ten hundred and fifty dollars on March the 16th, 1938.

Q. '38. And the next?

A. March—or, January 16th, 1940, twenty-seven hundred and fifty dollars.

Q. That's the only two withdrawal out of that account?

A. Prior to the date mentioned by you, yes sir.

Q. You do not know, Mr. Washburn, the relationship between those two parties on this contract, between father and son, do you? A. No sir.

Mr. Gagliardi: That's all.

Mr. Pomeroy: That's all.

(Witness excused.) [56]

### JAMES T. KERR

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. James T. Kerr.

(Testimony of James T. Kerr.)

Q. And what is your occupation?

A. President of the Washington Safe Deposit Company.

Mr. Pomeroy: Will you get the records for me please? Mark those please.

The Clerk: You want all these marked?

Mr. Pomeroy: Yes, all of them.

The Clerk: Plaintiff's Exhibit No. 11, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 11. Will you state what that is, if you know?

A. These are entry cards when they want to enter the safe deposit box.

Q. Does John Barcott have a box at your place of business? A. He does.

Q. How long has he had it?

A. Oh, I—the ledger account is there. I couldn't say [57] right off—

Mr. Pomeroy: You may hand him this to refresh his recollection.

A. The third of—third of September, 1942.

Q. He's had a box there since September 3, 1942?

A. Yes, that's this particular box. He might have had a box before that, but this particular box.

Q. This particular box. A. Yes.

Q. And he still has it at this time?

A. That's right.

Q. And does John Barcott's signature appear on Exhibit No. 11 marked for identification?

A. Yes, it does.

(Testimony of James T. Kerr.)

Mr. Pomeroy: I'll offer Exhibit No. 11, so that the defense counsel can——

Mr. Gagliardi: I object to it, incompetent, irrelevant and immaterial. It has no purpose, unless this exhibit shows that he did.

The Court: Objection will be overruled. It may be admitted in evidence. Exception allowed.

(Whereupon the entrance cards of the Washington Safe Deposit Company were admitted in evidence as Plaintiff's Exhibit No. 11.)

Mr. Pomeroy: You may inquire.

Mr. Gagliardi: May I see that, the exhibit? [58]

Mr. Gagliardi: No cross-examination.

Mr. Pomeroy: You may step down, Mr. Kerr.

(Witness excused.)

Mr. Gagliardi: I am renewing my objection as being incompetent, irrelevant——

The Court: The court has ruled upon it. There is no use to renew it.

Mr. Gagliardi: I suggest that I didn't make myself clear to your Honor. I want to be sure that your Honor understood my objection.

### JOHN PLANCICH

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. John Plancich.



(Testimony of John Plancich.)

Q. Spell it, for the——

A. P-l-a-n-c-i-c-h.

Q. And where do you live, Mr. Plancich? [59]

A. Anacortes.

Q. What is your occupation?

Q. General Manager of Fishermen's Packing Corporation.

Q. And do you know John Barcott?

A. Yes, I do.

Q. How long have you known him?

A. Oh, I guess for the last twenty years—all my life.

Q. Do you have with you the stock book of your corporation?

A. I have the ledger sheet affecting his stock holdings.

Q. Would you please let me have it?

Mr. Pomeroy: If you will mark this, please.

The Clerk: Plaintiff's Exhibit No. 12, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 12. Will you state to the Court what that is?

A. This is a stock—a sheet from the stock record book, showing the stockholdings of Mr. Barcott, and all the stock transfers that have occurred from the time of purchase of his stock to his present holdings.

Q. When does that—what is the first date on that stock book?

A. That's March 22, 1932. [60]

(Testimony of John Plancieh.)

Q. And does it carry through to the present date?

A. Yes. The last entry on here was a transfer of stock in—July 26, '46.

Q. July 26, '46. If you will hand that to the defense attorneys, please.

Mr. Pomeroy: I'll offer Exhibit No. 12.

The Court: Is that your original record?

The Witness: Yes, that's—

Q. If you will—do you have a record of the dividends paid during 1943, '44 and '45?

A. I haven't—I don't have the records with me. I have the minute books here that authorize payment of the dividends, and percentage.

The Court: Are you offering Exhibit No. 11?

Mr. Gagliardi: No objection to that exhibit.

Mr. Pomeroy: It's 12, your Honor.

The Court: Or 12. It will be admitted in evidence.

Mr. Pomeroy: Will you give that sheet of paper there— [61]

(Whereupon the original sheet from the stock record book of the Fishermen's Packing Corporation, showing the stockholdings and transfers of stock, of Mr. Barcott, was admitted in evidence as Plaintiff's Exhibit No. 12.)

Q. Is that a—

A. No, this is some notes that I've been—

Q. Well, may we have your minute book, please, and have it marked?

A. You—affecting the last three years?

(Testimony of John Plancich.)

Q. Affecting the last three years.

Mr. Gagliardi: The last three years, that concerning——

Q. 1943, '44 and '45.

A. '43, '44 and '45.

Mr. Pomeroy: If defense counsel has a moment to look at that, I think, your Honor, they may allow testimony to go in without putting the whole minute book in.

The Court: Very well.

The Clerk: Plaintiff's Exhibit No.——

Mr. Gagliardi: You may show it to him.

The Clerk: Plaintiff's Exhibit No. 13, for identification. [62]

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 13. Will you state what that is, if you know?

A. It's the minute book of the corporation.

Q. Does that show the amount of dividends paid to John Barcott by the corporation for the years 1943, '44 and '45?

A. Well, the dividends are authorized—payment of dividends are authorized by the Board of Directors and such action is recorded in the minutes of the Board of Directors.

Mr. Pomeroy: Now, if we can have the book——

Mr. Gagliardi: Will you mark the three years in question, so we don't have to look at the whole book?

The Witness: How's that?

(Testimony of John Planeich.)

Mr. Gagliardi: Will you mark the three years in question, so we don't have to look at the whole book? '43 and '44 and '45.

The Witness: I refer—refer to my notes here to see whether I gave any dividends to Mr. Barcott.

Mr. Pomeroy: May I see Exhibit 12?

The Court: Now if that is going to be a matter that is going to take some fifteen or twenty minutes—— [63]

Mr. Gagliardi: Well, I just wanted to ask him a question.

Showing you the minutes of the record of the meeting of March the 17th, '43, Plaintiff identification number—what? Twelve?

The Clerk: Thirteen.

Mr. Gagliardi: Thirteen. Will you point to the Court and jury where the dividends were declared? There was no dividend declared—I can't grasp it as fast as you can.

The Witness: It's in the minutes of April 22nd, not March 17th.

Mr. Gagliardi: Oh, I see. What do they declare as a dividend?

The Witness: "Moved by Nick Vitilis seconded by Anton Cortege that a ten percent dividend be paid on all outstanding stock as of date."

Mr. Gagliardi: As of that date.

The Witness: As of that date.

Mr. Gagliardi: Ten percent. Ten percent of the stock, or value of the stock, or the par value, or ten percent of what? Ten percent of——

The Witness: Ten percent of par value.

(Testimony of John Plancich.)

Mr. Gagliardi: ———or the earning? [64]

The Witness: Of par value.

Mr. Gagliardi: The stock was par value stock, or was non par value stock?

The Witness: Par value stock.

Mr. Gagliardi: And when was next dividend? That's the only dividend——

Mr. Pomeroy: What date was that now?

The Witness: That was on April 22, 1943.

Mr. Pomeroy: And when's the next one?

The Witness: The next was on January 27, 1944, "Motion by Nick Vitilis, seconded by Dick King, that a six percent dividend be paid on all outstanding stock as of date." Do you want the third one?

Mr. Pomeroy: Yes.

The Witness: The third one is April 19, 1945, "Motion by Dick King, seconded by Lee Mack, that a six percent dividend be paid on all outstanding stock as of date."

Mr. Pomeroy: Were those dividends paid by the company?

The Witness: Yes, they were [65]

Q. Referring to Plaintiff's Exhibit No. 12, it sets forth that during this period of time in 1943, '44 and '45, John Barcott had fourteen shares of stock. What was the par value of the stock?

A. A hundred dollars a share.

Q. Then the par value of the fourteen shares was fourteen hundred dollars?

A. That's right.

(Testimony of John Planch.)

Q. And the ten percent dividend would be a hundred and forty dollars paid to that stock.

A. That's right.

Mr. Pomeroy: You may inquire.

Cross-Examination

By Mr. Gagliardi:

Q. You have no knowledge as to whether or not Mr. Barcott was mailed a check for those dividends?

A. Whether he was mailed a check, did you say?

Q. Yes, whether the dividend was paid to him.

A. Yes, I am quite sure they were.

Q. You paid him a hundred and forty dollars dividend for first year; six percent in the next, that makes eighty-four [66] dollars.

A. That's right.

Q. And what was the last dividend?

A. Six percent also.

Q. How many shares did he have—fourteen shares? A. Fourteen shares.

Q. That makes again, sixty-four dollars—eighty-four dollars, for '45 and '44, and \$140 for '43?

A. That's right.

Mr. Gagliardi: That's all.

Mr. Pomeroy: You may step down. I was going to ask if it's satisfactory he takes the minute book away from evidence now. It's been marked.

Mr. Gagliardi: Yeah, we have no objection.

(Witness excused.)

Mr. Pomeroy: May I have Exhibits 1, 2, and 3. [67]



MRS. JOSEPHINE K. CORBIN

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Mrs. Josephine K. Corbin.

Q. Will you spell your last name, please?

A. C-o-r-b-i-n.

Q. And what is your occupation?

A. I am an auditor in charge of the—of a group of tax auditors in the Income Tax Department.

Q. Where?

A. Internal Revenue Department, in the Washington Building, Tacoma, Washington.

Q. Tacoma.           A. Right.

Q. Do you know John Barcott?

A. Yes, sir.

Q. How long have you known him?

A. I've known him for many years, ever since I started to work in town.

Q. And how long have you worked for the Government over in the Internal Revenue Department? [68]

A. Since July, 1933.

Q. The bailiff is handing you Exhibits 1, 2 and 3. Do you recognize those exhibits as having John Barcott's signature on them?           A. Yes, sir.

Q. And did you yourself prepare any of those exhibits?           A. Yes, sir.

(Testimony of Mrs. Josephine K. Corbin.)

Q. Which ones did you prepare?

A. The returns for 1943 and 1944.

Q. And where were you when you prepared those returns?      A. In my office.

Q. And did Mr. Barcott come to your office?

A. Yes, sir.

Q. And from what figures did you prepare those returns?

A. Well, the same as for any other taxpayer if he brought the information with him and supplied the figures, and from these figures which he gave me I prepared the returns in question.

Q. Did he have any books of account with him when he brought these figures to you?

A. No, as I recall, just—I don't really know what he had with him, but he had papers, information that was necessary, and it was sufficient upon which to prepare this return. [69]

Q. And how many papers would you say he had with him when he came in to have his income tax made out?

A. He had—it would be impossible to say just exactly how many, but he had apparently the necessary information, I would—he had an envelope, as I recall, with different information in it and whatever we needed we asked him for the figures, and the information, and he supplied the necessary information—figures.

Q. Did you see those figures yourself, or did he read them to you?      A. Both.

Q. You saw some of them and he read some to you?      A. That's correct.

(Testimony of Mrs. Josephine K. Corbin.)

Q. And as you went down the list of various items on the income tax returns, you would ask him what he had—what to fill in at that certain spot, is that right?

A. That's right, I would ask for the information the same as we do with all taxpayers, whatever was necessary and he supplied the figures and the information.

Q. But he had no books of account with him or anything of that kind?

A. As I recall, he didn't exhibit any to me.

Q. These——

Mr. Pomeroy: I think you may inquire. [70]

#### Cross-Examination

By Mr. Gagliardi:

Q. That is the ordinary procedure, Mrs. Corbin, of a taxpayer coming into the office of the Internal Revenue Collector and present information for you to prepare an income tax return, is it not?

A. That is right.

Q. And no one brings their books along with them. They bring the ordinary figure which are necessary to make out their return.

A. That is correct.

Q. And all of those who come to your office, they have the amount which they have received, their expenditure, and the source of where they come from, and then from that you file the return for them.

A. That is correct.

(Testimony of Mrs. Josephine K. Corbin.)

Q. You ask them some question, when they are pertinent, don't you?      A. Yes, sir.

Q. And he was not any different than any other taxpayer?      A. None whatsoever.

Mr. Gagliardi: That's all.

Mr. Pomeroy: You may step down.

(Witness excused.)

### HARRY O. SWANSON

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Pomeroy:

Q. Will you state your name to the Court, please?      A. Harry O. Swanson.

Q. And what is your occupation?

A. An Internal Revenue Agent.

Q. How long have you been employed by the Government?      A. Ten years.

Q. And what does a Revenue Agent do, just tell the Court——

A. A Revenue Agent examines income tax returns of all taxpayers on instruction and order from the Revenue Agent in Charge.

Q. Do you know John Barcott?      A. Yes.

Q. When did you first meet him?

A. On February 13, 1946.

(Testimony of Harry O. Swanson.)

Q. And what occurred on that occasion?

A. He was called to our office in the Puget Sound Bank Building to meet with myself and Special Agent Neilson. At that time he was requested, if he so desired, it would be advisable to recheck a safety deposit box at [72] the National Bank of Washington, which according to my information had been previously checked by Mr. Neilson.

Q. Then what occurred?

A. Mr. Barcott was agreeable and we proceeded to the National Bank of Washington, entered the vault and secured the box, retired to one of the small rooms, and checked the contents thereof.

Q. And what occurred after that?

A. Upon leaving the National Bank of Washington, we asked Mr. Barcott if he had another safety deposit box, and he replied, "Yes," he had one located in the Washington Building. We proceeded to the Washington Building and Mr. Barcott secured his box and opened it for inspection.

Q. And what did you find in that box?

A. Just some business insurance papers.

Q. And what did you do with respect to John Barcott after that?

A. I proceeded to make an audit of such records as Mr. Barcott had and secure information from such other sources as were available in an attempt to determine Mr. Barcott's income for the years 1943, 1944 and 1945.

(Testimony of Harry O. Swanson.)

Q. In preparing this audit, did you have available the income tax returns of John Barcott and Katie Barcott, [73] his wife, for the years 1943, '44 and '45? A. Yes, I did.

Q. And did you have available the banking records of the National Bank of Washington of the California Oyster House, and the checking account, and the savings account of John Barcott, and the information concerning the conditional sales contract and real estate contract in the name of John Barcott?

A. Yes, they were examined at the banks—or at the sources.

Q. And then you proceeded to prepare a statement of income, is that correct?

A. That's right.

Q. And what method did you use in establishing this income?

A. This income was determined on the increase in net worth basis.

Q. And explain to the Court just exactly what you mean by that.

A. The net worth basis is the basis used in determining income where complete and adequate records are not maintained by the taxpayer. The income is computed on the difference between the net worth of the taxpayer at the beginning of the year and the net worth at the end of the year, the difference constituting income, provided of course, that as far as it is able to be [74] determined it comes from a taxable source, such as salaries, wages,



Testimony of Harry O. Swanson.)

dividends, interest, business income, or rents. This was done in the case of John Barcott, as his records did not appear adequate to make a complete and detailed audit as such.

Q. And what did you find—then you started your account as of December 31, 1942, is that correct?

A. Yes, or similarly, January 1, 1943.

Q. And then did you compute it for each year hereafter until December 31, 1945?

A. I did.

Q. Do you have your working figures with you here? A. Yes, I do.

Q. Will you state what you found to be the net worth, and what items composed it, as of December 31, 1942?

Mr. Gagliardi: I'm objecting, Your Honor, unless he shows what sources he has derived this information. We ought to at least know where he got this information what our net worth was on December 31, 1942, before he draws his conclusion by saying that that's all we were worth. I'm objecting to that.

The Court: I thought he did state from what source. If he did not, you may ask him the question again. [75]

Mr. Pomeroy: Well, I went through the Exhibits, if the Court please, and the fact that he had made an audit of his safe deposit box and all these other things, and he said he used all those in making his report. I don't know what more I can ask him.

(Testimony of Harry O. Swanson.)

The Court: That is the Court's impression, but I think you may ask him again, if counsel misunderstands what he——

Q. From what sources did you obtain the information concerning the defendant, John Barcott's net worth?

A. From the inventory of the contents of his safe deposit box in the National Bank of Washington, the checking account at the National Bank of Washington, the savings account at the National Bank of Washington, the conditional sales contract at the National Bank of Washington, the real estate contract at the National Bank of Washington, the records of the Fishermen's Packing Corporation at Anacortes, Washington, and the records of the Pierce County Courthouse relative to real estate transactions.

Q. What did you determine to be, and the items of his net worth, on December 31, 1942? [76]

Mr. Gagliardi: Again, if Your Honor please, I am objecting because this man hasn't shown any information that he had. I would like to ask a question before Your Honor may rule——

The Court: Let's proceed. The Court has overruled your objection.

Mr. Gagliardi: Then if Your Honor please, I would like to see that my records are correct. I am objecting to this man as testifying to any information which he didn't have at the time when he says—his testimony so far goes now. So I call

(Testimony of Harry O. Swanson.)

Your Honor's attention that the first time he met John Barcott was in January, 1946, that the first time he examined the books——

The Court: I don't really want an argument. Now I understand the position you take, and I am overruling your objection and allowing you an exception, so we will get along.

Q. Please state the items and what his net worth was according to your figures on December 31, 1942.

A. The net worth as of December 31, 1942, was determined to be \$57,278.56.

Q. And just explain the items and the source of your information concerning those items, so that they total up to \$57,000 some odd dollars. [77]

A. The first item on hand was cash in the safety deposit box at the time I checked it on February 13th, of \$23,000, consisting of——

Mr. Gagliardi: Just a minute. If Your Honor please, I would like to know the year. February 13th of what year?

The Witness: 1946.

Mr. Gagliardi: You were talking about 1942. You are talking as to value in 1942, it was determined how much Mr. Barcott was worth on January 1, 1942, by testimony of information which you got out of the box in 1946.

The Court: He has testified that he found his net worth in January '42 to be \$57,000 plus.

Mr. Gagliardi: Well that's what was in the box, the money that was in the box in 1946.

(Testimony of Harry O. Swanson.)

The Court: Mr. Gagliardi, you interject so much argument to your objections. If you will just make them and just briefly state your ground we will save a lot of time and save a lot of record.

Mr. Gagliardi: I am sorry, Your Honor, that I may be too talkative in cases of this kind. I am objecting because the witness testified that his information he got out of the safe deposit box was in January— [78] February 13, 1946, and he is testifying by what he found in the box on that date he determined that Mr. Barcott was worth \$57,000 on January 1, 1942. I am objecting that the information——

The Court: The objection will be overruled, an exception allowed. You will have an opportunity to cross-examine as to how he arrived at his conclusion.

Q. My understanding, Mr. Swanson, is to the effect that the date you are talking about is December 31, 1942, is that correct?

A. That's right.

Q. Not January, 1942. This is December 31, 1942.

A. December 31st.

Q. And the \$23,000 item of cash is the same amount of cash that you found in a safe deposit box in January of 1946, is that correct?

A. That's right.

Q. And you were not charging, for income tax purposes, Mr. Barcott——

Mr. Gagliardi: I object. I am going to object now, Your Honor. His asking for the explanation is argumentative.

The Court: Proceed.

Testimony of Harry O. Swanson.)

Q. You were not charging him with income of 3,000, you are giving him the idea that he had the 3,000 on [79] December 31, 1942.

A. That's right, I was giving him credit for it the beginning of the period.

Q. In other words, you are not charging him over the period at all.           A. That's right.

Q. All right, now what is the next item that you have to make up this \$57,000?

A. Savings account at the National Bank of Washington, number 64787.

Q. How much does that amount to?

A. As of December 31, 1942, according to the records of the bank, there amounted to \$2,279.53.

Q. You received that from the bank?

A. That's right.

Q. And what is your next item?

A. The next item is a checking account at the National Bank of Washington.

Q. How much did you credit him there?

A. That was estimated at a thousand dollars.

Q. And how do you estimate it at a thousand dollars, and tell the jury why you estimated it.

A. That was an average monthly balance. The reason it was taken at a thousand dollars, it remained at an average [80] figure like that, such as—through the entire period. It showed no accumulations and no large disappearance. Just a general business account.

Q. Now, what is the next item that you have on there?

A. United States Savings Bonds, at cost.

(Testimony of Harry O. Swanson.)

Q. And what are those—what amount do you have for that?

A. December 31, 1942, we have a cost value of \$14,450.

Q. And how did you get that figure?

A. By referring to the issue dates on the bonds which were inventoried in the box on February 13, 1947—'46, rather.

Q. What other information did you have to check on the amount of bonds that he had?

A. I checked with the records of the Fiscal Administrator who takes—keeps the records for all bond transactions.

Q. And those are represented here in evidence by Exhibits number 4, 5, and 6, is that correct?

A. I believe that's right.

Q. These exhibits here, 4, 5, and 6. Then what is the next item that you have?

A. Real estate contract, number 803A, in the National Bank of Washington.

Q. How much was that?

A. That had a balance at the end of 1942, of \$1,596.35.

Q. And where did you get that information? [81]

A. From the National Bank of Washington.

Q. And what is your next item?

A. Conditional sales contract.

Q. And what amount do you have for that?

A. \$494.73.

Q. And where did you get that information?

A. From the records of the National Bank of Washington.



(Testimony of Harry O. Swanson.)

Q. And what is your next item?

A. Home and furnishings.

Q. How much is that?

A. It was estimated at \$8,000, and remained so through the entire period.

Q. In other words—who estimated it?

A. I estimated it.

Q. You estimated it, but you didn't change that——

A. I didn't change it; it doesn't affect the income.

Q. And business fixtures—I mean, what is the next item?      A. Business fixtures.

Q. And how much is that?      A. \$3,815.90.

Q. Where did you get that figure?

A. From the income tax return filed by Mr. Barcott.

Q. That's Mr. Barcott's own figures, then.

A. As far as I know, it is. [82]

Q. They were on his income tax return?

A. Yes, sir.

Q. And what is the next item you have?

A. Stock in the Fishermen's Packing Corporation.

Q. How much is that?

A. Fourteen hundred dollars.

Q. Where did you get that information?

A. From the records of the Fishermen's Packing Corporation.

Q. And what is your next item?

A. Lots 3 and 4 of Block 9729, Tacoma Sixth Addition.

(Testimony of Harry O. Swanson.)

Q. And what amount do you have for that?

A. \$3,150.

Q. And how did you arrive at that?

A. From the records of the Pierce County Courthouse.

Q. Now does that figure go all——

A. That remains the same all the way through, and doesn't affect the income.

Q. It doesn't have any affect on the final result. What is your next item?

A. Lots 19 and 20, Block 8633. Tacoma Sixth Addition.

Q. What do you have for that?

A. I'm sorry, that isn't on there at the end of 1942. It was acquired in '43.

Q. You have something down there, what is it?

A. I have "none" there. [83]

Q. When did he acquire Lots 19 and 20?

A. He acquired that in 1943.

Q. And the items that then you have then totaled up to date, amounted to how much?

A. \$59,186.51.

Q. And then you give him a credit for depreciation? A. I do.

Q. And what amount is that?

A. Accumulated depreciation reserve on the business fixtures of \$1,907.95.

Q. And that makes the net worth then that you figured—— A. Of \$57,278.56.

(Testimony of Harry O. Swanson.)

Q. Tell the Court how you got your figure for reserve for depreciation.

A. That was taken from the return of John Barcott.

Q. In other words, that's John Barcott's own figure.      A. That's right.

Q. Now then, you're—you have taken that as a starting point from December 31, 1942?

A. That's right.

Q. And your next date then, is December 31, 1943, or one year later, is that right?

A. That's right.

Q. Now these same items, will you tell what you have for [84] cash on hand?

A. Yes, the same as the amount at the beginning, \$23,000.

Q. And your next item, savings account in the National Bank of Washington, what do you have there?      A. That increased to \$2672.13.

Q. Does that show an increase——

A. It does.

Q. ——or a decrease?      A. From \$392.60.

Q. Increase?

A. That's right, increase.

Q. And you have a checking account in the National Bank of Commerce.

A. National Bank of Washington.

Q. National Bank of Washington.

A. Yes, sir. That remained at the same figure of \$1,000.

(Testimony of Harry O. Swanson.)

Q. And then you have U. S. Savings Bonds at cost, and what figure do you have for that?

A. \$35,200.

Q. And what does that show, an increase?

A. It shows an increase.

Q. Of how much? A. \$20,750.

Q. Then your real estate contract, how much do you show [85] for that? A. \$1,448.07.

Q. What does that show? A. A decrease.

Q. Of how much? A. Of \$148.28.

Q. And your conditional sales contract, what do you have for that?

A. That showed a decrease of \$106.59.

Q. And then your home and furnishings remain the same. A. That's right.

Q. Your business fixtures, what does that show this time?

A. It shows an increase of \$1,109, giving an ending balance of \$4,924.90.

Q. And how did you—where did you get the figure \$1,109?

A. The \$4,924.90 was set forth on the return.

Q. That's John Barcott's own figures.

A. That's right, and the \$1,109 is the difference between that and the one he showed on the previous year's return.

Q. And the Fishermen's Packing Corporation stock, does that remain the same?

A. That remained the same.

Q. And the Lots 3 and 4, Tacoma Sixth Addition, does that remain the same? [86]

A. That remained the same.

(Testimony of Harry O. Swanson.)

Q. Lots 19 and 20?

A. They were acquired during 1943, at an estimated cost of \$750.

Q. Now what does your total assets of—

A. \$81,933.24.

Q. And did you then give a reserve for depreciation?      A. I did.

Q. How much was that?      A. \$2,726.58.

Q. Showing a net worth of how much?

A. \$79,206.60.

Q. All right, now, this reserve for depreciation, again where did you get that?

A. I got that from the income tax return of Mr. Barcott for the year 1943.

Q. Mr. Barcott's own figures.

A. That's right.

Q. And what does your net worth then show, an increase or a decrease?

A. It shows an increase during the year.

Q. An increase of how much?

A. \$21,928.10.

Q. Now, on December 31, 1944, cash on hand item, what does [87] that show?

A. The same amount as at the beginning of the year, \$23,000.

Q. And your savings account, what does that show?

A. It showed an increase to \$3,191.32, or an increase of \$519.19.

(Testimony of Harry O. Swanson.)

Q. And your checking account, what did that show?

A. That remained the same as at the beginning, \$1,000.

Q. Your United States Savings Bonds, how much did that show?

A. \$54,200, or an increase of \$19,000.

Q. Now, on these dates on these savings bonds, you got the dates of knowing what year that they were purchased from the bonds themselves, is that right?

A. That's right.

Q. The issuing date. The real estate contract, how much does that show?

A. \$1,214.25, or a decrease of \$233.82.

Q. And the conditional sales contract?

A. \$232.94, or a decrease of \$155.20.

Q. And the home and furnishings remained the same?

A. That remained the same.

Q. Business fixtures?

A. They remained the same. [88]

Q. Fishermen's Packing Corporation?

A. Remained the same.

Q. Lots 3 and 4? A. Remained the same.

Q. Lots 19 and 20?

A. Remained the same.

Q. Making a net—or total assets of how much?

A. \$101,063.41.

Q. And how much depreciation did you allow then?

A. A reserve for depreciation of \$3,600.66.



(Testimony of Harry O. Swanson.)

Q. Where did you get that figure?

A. From the return of Mr. Barcott.

Q. Mr. Barcott's own figures?

A. That's right.

Q. All right, now what did you find his net worth to be then on December 31, 1944?

A. \$97,462.75.

Q. How much is that an increase over the previous year? A. \$18,256.09.

Q. Now getting down to December 31, 1945, what do you show there for cash on hand?

A. The same amount as at the beginning, \$23,000.

Q. And what do you show in the savings account?

A. \$3,629.03, or an increase of \$437.71. [89]

Q. What do you show for the checking account?

A. It remains the same as at the beginning.

Q. What does it show for United States Savings Bonds?

A. Increase to \$74,200, or an increase of \$20,000.

Q. And you have since found another one, is that correct? A. Well, not in that year.

Q. Not in—what year did you find it in?

A. 1944.

Q. How much was that bond?

A. That was a five-thousand-dollar bond.

Q. That has not been figured in this total at all?

A. No, it hasn't. It is not in this total.

Q. This shows an increase over 1944 then, of \$20,000? A. That's right.

Q. The real estate contract, what does it show?

A. It shows a decrease to \$1,039.83, or a decrease of \$174.42.

(Testimony of Harry O. Swanson.)

Q. And conditional sales contract, what do you show for that?

A. \$65.99, or a decrease of \$166.95.

Q. And home and furnishings?

A. That remained the same.

Q. Business fixtures?

A. Remained the same. [90]

Q. Fishermen's Packing Corporation stock?

A. Remained the same.

Q. Lots 3 and 4? A. Remained the same.

Q. Lots 19 and 20?

A. They were not in there at the end of '45, since the lots were sold during 1945.

Q. What do you show then to be the total assets of December 31, 1945? A. \$120,409.75.

Q. Do you show a reserve for depreciation there? A. I do.

Q. How much? A. \$4,093.15.

Q. And where did you get that figure?

A. From the return of Mr. Barcott.

Q. That's his own figure?

A. That's right.

Q. What do you show his net worth to be then on December 31, 1945? A. \$116,316.60.

Q. You then figured from this net worth computation, the accrued tax that he should have paid, is that correct? A. Yes. [91]

Q. Now these income taxes that he paid, what type of return did he make? Was it a community property return?

A. Yes, he made a community property return.

(Testimony of Harry O. Swanson.)

Q. Explain that to the Court. There may be someone who doesn't understand that.

A. Under the community property laws of the State of Washington taxpayers, insofar as the income is community income, are entitled to divide it and file it between two returns, the husband's return and the wife's return.

Q. Then on the three years that we are talking about, that is, 1943, 1944 and 1945, each of John Barcott's returns were community property returns?

A. That's right.

Q. And a similar return for the same amount was returned by Katie Barcott, his wife?

A. That's right.

Q. All right, now state how you recapitulated from these figures to find what his accrued income tax should have been.

A. For the year 1943, as I stated previously, the increase in net worth was \$21,928.10, to which have been added certain expenditures which are not deductible. Life insurance premiums in the amount of \$230—— [92]

Q. Where did you receive that figure?

A. From the records of the Prudential Life Insurance Company, Tacoma.

Q. That he paid \$230 a year life insurance premiums?

A. That's right.

Q. All right.

A. And during the year 1943, he paid Federal income taxes of \$2,654.56.

(Testimony of Harry O. Swanson.)

Q. Now did he pay that, or that was for him and his wife?

A. That was paid for him and his wife, since the total net worth has been computed for both.

Q. Yes, all right.

A. Those two items are not deductible expenditures, and have been added to the increase in net worth, giving the corrected income on the net worth basis for the year 1943 of \$24,812.66, as against the total net income reported of \$13,440.79.

Q. Making a difference of—

A. Making a difference of \$11,371.87 for the year 1943.

Q. That is unreported income.

A. That's right.

Q. Now that—does that include anything for living expenses of any kind, of clothing or anything else? A. It does not. [93]

Mr. Gagliardi: Your Honor, I am objecting to counsel leading this witness and putting all the answers in his mouth.

Mr. Pomeroy: Well, if the Court please, I don't—I am sorry if I have been leading—

The Court: Let's proceed.

Mr. Pomeroy: —but he knows more about it than I do. What was my last question?

(Question read.)

Q. In other words, if he had spent anything for food, or clothing, it would increase the amount that you would claim, is that right?

(Testimony of Harry O. Swanson.)

Mr. Gagliardi: I am objecting, your Honor, again he——

The Court: Objection will be overruled.

A. Any amounts which have been expended for personal living expenses are not deductible. They would serve to increase the income, yes.

Q. But you have not included any of that in the——

A. I have added nothing for his living expenses, no, sir.

Q. Now, if you will please recapitulate as to the income tax for the year—calendar year 1944.

A. You mean the income tax or the income?

Q. The income, including the income tax—just the income.

A. As I stated previously, the increase in the net worth for the year 1944 was \$18,256.09, to which has been added the unallowable life insurance premiums of \$230 and the Federal income taxes paid of \$2,367.12, giving a corrected net income on the net worth basis, of \$20,853.21, as against the net income reported of \$12,265.13, or an understatement of \$8,588.08.

Q. Now tell us then, and recapitulate for the calendar year 1945.

A. The net increase in net worth as I reported before, is \$18,853.85, to which is added the life insurance premiums of \$230 and Federal income taxes paid of \$4,193.98, giving a corrected income on the net worth basis, of \$23,277.83, as against the net income reported of \$15,777.95—between—\$15,777.95, or an understatement of income of \$7,499.88.

(Testimony of Harry O. Swanson.)

Q. Basing your deductions on—for the calendar year 1943, on the understatement of income which is chargeable, \$11,371.87, how much of an income and victory tax would there be due on that?

A. Well, that understatement, divided between the husband and the wife, on the community property basis, and the corrected income tax income of John Barcott, is \$12,406.33. [95] and a corrected victory tax of \$12,551.94, and the corrected tax liability of \$3,646.25, as against \$1,545.38 reported on the return, or a deficiency in income tax of \$2,100.87.

Q. For the calendar year 1944, using your figures showing an understatement of income of \$8,588.08, what is the income tax that he should have paid there?      A. \$2,727.85.

Q. Using your figures and deductions as of—for the calendar year 1945, showing an understatement of income of \$7,499.88, what income tax should John Barcott have paid for that?      A. \$3,201.96.

Mr. Pomeroy: You may inquire.

The Court: It is now time for the afternoon intermission, so we will take the intermission. The audience will remain seated while the jury pass to the jury room for a 15-minute recess.

(Recess.)

The Court: Are you finished with your direct examination?

Mr. Pomeroy: Yes, I said—— [96]



(Testimony of Harry O. Swanson.)

Cross-Examination

By Mr. Gagliardi:

Q. Mr. Swanson, the first time you met Mr. Barcott was February 13, 1946. A. That's right.

Q. And on that date he came to your office in the Puget Sound Bank Building.

A. That's right.

Q. And at that time you requested him to check the safe deposit box. A. That's right.

Q. The contents to inventory them.

A. That's right.

Q. And he had no hesitancy, he let you go into the box. A. No, sir.

Q. You advised him at that time also that he was free to refuse you that permission?

A. That's right.

Q. He say he have nothing to conceal, he was glad to show it to you.

A. He said he would be glad to show it to us.

Q. And then you went to the box. That was the first time you opened that box?

A. That's right. [97]

Q. That's the first time you saw what was in that box? A. That's right.

Q. And in inventorying the contents of the box you found something like \$75,000 worth war bond?

A. That's right.

Q. \$23,200—— A. \$23,000.

Q. \$23,000 in cash. A. That's right.

(Testimony of Harry O. Swanson.)

Q. Then you examined the date of the war bonds. A. That's right.

Q. And after you examined the date, you assumed that Mr. Barcott, all he had in that box in December 31, 1942, was \$23,000.

A. That's right.

Q. You had no other information but your own assumption. A. That's right.

Q. Then the bonds were purchased after January 1, 1943. The bonds that you inventoried were purchased after January 1, 1943.

A. No, sir, that's not quite true. We inventoried all that were in the box, some were purchased prior to that date.

Q. Some were purchased prior to that date, and some were purchased prior—after that date. [98]

A. Yes, that's right.

Q. Those who were purchased prior to that date, you assumed that he had them before January 1, 1943.

A. We—from the issue date we determined they were purchased at a certain time, and if they were issued prior to January 1, 1943, we assumed they were purchased prior to January 1, 1943.

Q. And what he purchased after January 1, 1943, then you assumed he purchased on that time.

A. At the issue date, yes, sir.

Q. Issue date. And you assumed that he got that money from the business.

A. Yes, I had no other knowledge.

(Testimony of Harry O. Swanson.)

Q. You had no other knowledge, you made no other inquiry.

A. I made other inquiry, yes sir.

Q. Where did you inquire?

A. We inquired from Mr. Barcott, he was asked numerous times after the first contact if he had any other source of income.

Q. Just asked the sources of income.

A. That's right.

Q. Did he tell you that he had been in business since 1919?

A. That's right.

Q. That he, his wife, and his son, operate the restaurant [99] since 1919 continuously, the California Oyster House.

A. I am not sure about the other members of his family, but he said that he had operated the restaurant——

Q. Didn't he say he and his wife and the two sons operate it?

A. He said his wife had been there part of the time.

Q. Yeah. You in determining the net worth of Mr. Barcott assumed that in January 1, 1943, he only had \$23,000 in cash, and whatever bond he had purchased prior to that time, and also the real estate and the restaurant.

A. That was all, yes.

Q. And that's purely assumption. There is nothing upon which you could base any facts.

A. Oh yes, they were assets which were examined.

(Testimony of Harry O. Swanson.)

Q. Were examined.

A. Purchased at a certain date.

Q. And because they were purchased on a certain date, then you assumed they were acquired by earning after that date—prior to that date.

A. Prior to that date.

Q. And it must have been earned before the—between the first of January and the date in which they were purchased in 1943? See if I make myself clear. Any bond which he purchased during the year 1943, you assumed that was income that he received from the first of January [100] during the year up to the date he purchased the bond.

A. That's right.

Q. You had no information whatever what asset that Mr. Barcott had prior to January 1, 1943, whether it was in cash, bond, mortgages or other property.

A. Well, that's not true.

Q. Do you have any information——

A. We examined the savings accounts back to the time that he first started, then we examined the conditional sales contract back to the time he started, then the real estate contract, and such bonds that were still in the box—the inventory date, if they were purchased prior to January 1, 1943, they were examined.

Q. But so far as pertaining to the cash in which he purchased additional bond in 1943, and additional bond in 1944 and '45, you had no informa-

(Testimony of Harry O. Swanson.)

tion where the money came from except what you assumed that it came from the business.

A. I assumed it came from the business.

Q. Yeah. And whether or not Mr. Barcott in a period of thirty years, or twenty-nine years, had accumulated all this money and during the war purchased war bond, you did not know, or you do not know to this day.

A. I have very good reason to believe that he could not [101] have had it on hand.

Q. Well, I don't care for the reason, Mr. Swanson. I wonder if you have any knowledge as to whether or not Mr. Barcott during prior to January 1, 1943, had not accumulated a sufficient estate to purchase bond when the Government needed the money.

A. I didn't know Mr. Barcott at that time.

Q. You did not? During that time, Mr. Swanson, it was customary for the Government to make issue of these bond periodically, in appealing to the public to buy bond at that particular time, was it not?

A. That's right, during the war, yes——

Q. And those bond that he was purchasing, was on those date on which the Government was appealing to purchase the bond, as a new issue was put into the market, wasn't it?

A. I don't know. I don't know the issue dates that the Government appealed——

(Testimony of Harry O. Swanson.)

Q. I thought you looked at the issue dates. But you recall that the Government from time to time made a new issue bond and appealed to the public to purchase them.

A. Yes, they had war bond drives, if that's what you mean.

Q. Yeah, war bond drive. Did you check those bond as to whether or not those bond were not bought during this period when the Government was requesting, if not [102] directing, that the citizens purchase the bond?

A. All I checked was the fact the bonds were issued at a certain date.

Q. That's all. And by reason of that you concluded that he earned that money during that time.

A. That's when the visible assets came into existence.

Q. That's the time when you saw the visible asset in 1946.

A. That's right.

Q. And did you examine the book of Mr. Barcott, as to the book that he was keeping in 1943, '44 and '45, did you examine his daily cash as well as expenses?

A. I ran through them.

Q. Yeah. Is that a fact that he didn't have much money?

A. His books did not reflect that.

Q. You inquired from Mr. Barcott to also show you all of the vouchers of his purchase, if he had any. Didn't you?

A. That's right.



(Testimony of Harry O. Swanson.)

Q. And also inquired from him to allow you to check the restaurant receipts for two weeks.

A. That's right.

Q. And did he allow you to do that?

A. He did that.

Q. Yes, and you checked all his records. [103]

A. He had no vouchers.

Q. Well, he had no voucher because everything he was doing, transacted business in cash.

A. That's right.

Q. He allowed you to run the restaurant for him for two weeks.

A. No, I didn't run his restaurant.

Q. I don't mean run it, but check the restaurant for two weeks.

A. I requested him to keep his sales tickets for a period of two weeks.

Q. Yeah. And he kept them. And you went there from time to time to watch and see whether those tickets had been kept.

A. No sir, we went there at the end of two weeks and received the tickets.

Q. You received the ticket. And how did they compare with the receipt that he showed in the book he was keeping? A. They didn't.

Q. How did they compare, favorably or unfavorably. A. May I refresh my memory?

Q. Yes, we want to get the facts.

A. During this period from February 12th through February 26th, 1946, the sales tickets totaled \$4,402.47; the [104] cash register for that

(Testimony of Harry O. Swanson.)

period for his sales record, showed \$4,158.90, or a difference between the cash register and the sales tickets of \$243.55 for a period of two weeks. In other words, the cash register was short by \$243.55 from the sales tickets.

Q. And Mr. Barcott furnished that information himself?      A. That's right.

Q. He gave you the ticket as well as he gave you the sales slip from the—records from the cash register?      A. That's right.

Q. And either the cash register was faulty, or somebody was stealing, was that it?

A. As near as Mr. Barcott could explain it was, that someone was dipping into the cash during that period.

Mr. Gagliardi: That's all.

Mr. Pomeroy: Just a minute, Mr. Swanson.

### Redirect Examination

By Mr. Pomeroy:

Q. You were asked how you knew that Mr. Barcott did not have any more cash on hand on December 31, 1942, than \$23,000 which you gave him the benefit of the doubt by saying he had on hand. Tell what—tell what records you examined in order to determine that he could not [105] have had any more cash on hand.

A. I examined the records of the Collector of Internal Revenue in Tacoma, for the period 1919 through 1942, to determine what income taxes had been paid during that period by Mr. Barcott.

(Testimony of Harry O. Swanson.)

Q. And after you received this information as to the amount of tax paid by Mr. Barcott from 1919 to 1942, did you make a list of what his income was from 1919 to 1942?

A. I made a determination in order to try to compare my opening net worth with what he could have purported from his income tax returns. From 9—may I go ahead?

Q. Go ahead.

A. From 1919 through 1942, Mr. Barcott only reported tax in four years; 1929, \$12.07; 1936, \$17.25; 1937, \$3.81; and 1938, \$10.29; and in 1942 he reported taxable income of \$8,236.30. I don't have the tax paid for '42, since that was a forgiveness year in—when the Return Tax Payment act became effective.

Q. And then, from those figures you determined what his maximum income would have been on those tax figures, is that correct?

A. Yes, a person is liable for tax, an individual, in amount in excess of his personal exemptions. I allowed Mr. Barcott a marital exemption in each one of the years, [106] a credit for dependents in each one of the years. Now, in the years he paid no tax, which were all the years from 1919 through 1942, except the six years I have mentioned, he paid no tax, and I allowed him the full amount of the personal exemptions. From the years 1919 through 1942, the maximum taxable income based on the returns which he filed for those years could have been \$89,291.09 for the twenty-four years.

(Testimony of Harry O. Swanson.)

under the assumption that he made the maximum in each one of the several years. During those years it cost Mr. Barcott and family something to live, and I estimated his living expenses at \$125 a month during those periods, for his wife and his family, for the period of the twenty-four years, which would give him a reduction in the estimated income of \$36,000. On that basis he had a possible net worth, based on the income tax returns which he filed from 1919 through 1942, of \$53,000. That against the net worth which I start in my computation of \$57,278; in other words, my opening net worth was greater than I determined on this maximum basis. [107]

#### Recross-Examination

By Mr. Gagliardi:

Q. Mr. Swanson, you have the amount which was exempted each year?           A. Yes, I do.

Q. And the total amount of exemption would make \$89,000.

A. Except, Mr. Gagliardi, except in the years in which he paid the tax, I determined what the taxable income was and allowed him the additional amount.

Q. You allowed the additional amount and determined income of Mr. Barcott from 1919.

A. That's right.

Q. You started from 1919——

A. That's right.

Q. ——or 1920?           A. 1919.

(Testimony of Harry O. Swanson.)

Q. To—— A. Through 1942.

Q. To December 31st, inclusive, 1942, was the maximum amount of \$89,000.

A. That's right.

Q. On which he didn't have to pay any taxes.

A. No, some of those years he paid some tax. A small amount.

Q. In some he paid some taxes. Then you allow him expenses [108] of \$125 a month to live on?

A. That's right.

Q. That is in taking consideration he was run a restaurant and the whole family eating there——

A. Well, really, eating in the restaurant, you can't deduct that from your taxable income, Mr. Gagliardi.

Q. I realize that. But we don't have very many restaurant men that charge themselves a meal, do you?

A. I think so, Mr. Barcott—or Mr. Gagliardi, and the law requires that you do. To the extent that you eat in a restaurant, that's taxable income.

Q. Did you take in consideration also the earning of Mrs. Barcott during those years in which she was working in the restaurant from 1919 to 1936?

A. To the extent that she had any earnings in the restaurant it would be community income and taxable just as though it had been earned by Mr. Barcott.

Q. But you made an allowance a hundred and twenty-five dollars a month that Mr. Barcott and his family must have spent.

A. That's right.

(Testimony of Harry O. Swanson.)

Q. If he didn't spend that \$125 or they had some other income in which they lived, then they would have earned \$89,000, wouldn't they? [109]

A. Well, if he made—accumulated more than the \$53,000, he would have had to pay some tax in the years in which he paid no tax, from 1919 through 1942.

Q. Assuming, Mr. Swanson, that he had, and his wife had, some independent sources upon which they lived, which you could not classify either income, or at any event it would not be a criminal offense not to report it, he would have earned \$89,000, if he had some other sources of revenue in which he was living on.

A. Yeah, if there were other sources they were still taxable.

Q. If he didn't pay any taxes, then, I mean that those years they were violating the law then.

A. Yes, he wasn't reporting at all in those years, he was violating the law as well as anyone later would be violating the law.

Q. Yeah, but in assuming a hundred and twenty-five dollars a month, you assume that these people lived to the station in life in which to spend that much money, even during depression.

A. I believe that he did pay that much.

Q. Yeah, but if no expense were deducted at all—that's the only answer I want to get from you—that the expenses came from other sources



(Testimony of Harry O. Swanson.)

which we are able to account, [110] then Mr. Barcott in January 1, 1943, would have \$89,000 of asset, wouldn't he?

A. I stated that this was the maximum——

Q. The maximum. He could have——

A. He could have had that.

Q. Yeah.

A. If he hadn't spent a cent on living.

Q. Each year of this tax, you have in your report how much a man is entitled to earn or receive before he makes a report for income tax?

A. Yes sir.

Q. And each year also that he pay tax you give him credit for what he paid the taxes?

A. That's right.

Q. And six years he paid taxes. In the year 1929, how much was the tax? A. \$12.07.

Q. How much would the earning be?

A. \$4,900—\$4,950 roughly. Four thousand, nine hundred——

Q. And that's besides the exemption?

A. That's the maximum.

Q. Maximum—from that you deducted the exemption?

A. From that you deduct the exemptions of \$4,700.

Q. How much? [111]

A. Forty-seven hundred dollars.

Q. Forty-seven. What was the rate of taxation in those years? A. A half of one percent.

Q. One half of one percent. And that would make then twelve dollars. A. \$12.07.

(Testimony of Harry O. Swanson.)

Q. And also then, you assume that when he went to business in 1919 he didn't have any money?

A. That's right, under this computation.

Q. And also you assume that Mrs. Barcott—

A. May I clarify that, just a second? I stated at the beginning that this was determined from the records of the Collector of Internal Revenue, and that is the first year for which they had a record of a return being filed. Now, it might be that he had filed prior to that.

Q. I see, but in 1919 when he went into business, you have no knowledge of how much money he had to start in business?      A. No sir.

Q. And you did not know how much money Mrs. Barcott had?      A. No sir.

Q. And you didn't know how much Mrs. Barcott's mother left her when she died, did you?

A. No sir. Mr. Barcott was asked for the information—rather, that information, but he never volunteered it.

Q. All of these taxes that you have given the Court and jury the benefit of knowing that were not paid, were on the assumption that Mr. Barcott had nothing else on January 1, 1943, except what you say was in the box, at that time.

A. A tax is computed on the increase of certain items.

Q. Increase during those years.

A. During those years, not—it wouldn't matter a bit if the amount was less. It's only on the increase that a man makes from the beginning of the

(Testimony of Harry O. Swanson.)

year and the end of the year. So the amount that you start with is of little or no consequence for the purpose of determining the increase of that year.

Q. And the increase, you mean to say, the additional asset acquired during the year?

A. That's right.

Q. And where the money came from, you have no knowledge, except what you assume it came from the business.

A. We—as far as we know, it came from the business, and we had no other source to the amount during those years.

Q. You have no other knowledge——

A. 1943, '44 and '45. No sir, except from the dividends [113] and interest.

Mr. Gagliardi: That's all.

The Clerk: Plaintiff's Exhibit No. 14, for identification.

### Redirect Examination

By Mr. Pomeroy:

Q. I am handing you what is marked for identification as Plaintiff's Exhibit No. 14. I will ask you to state what that is, if you know.

A. It's an agreement between John Barcott and the Fishermen's Packing Corporation, dated on May 22nd, 1940.

Q. Did you see that before?

A. I looked at this when I was going through some records of the Fishermen's Packing Corporation, yes sir.

(Testimony of Harry O. Swanson.)

Q. And that is a note, is it not, of indebtedness of Mr. Barcott?

A. It's an agreement in the settling of a note.

Q. Settling of a note.

A. That's right.

Q. And when did—in computing your figures, when did Mr. Barcott pay off that note?

A. Mr. Barcott did not pay off the note as such. We took a reduction in the stock interest which he had in the [114] Fishermen's Packing Corporation.

Q. And when was that?

A. During the year 1940, in May, I believe.

Q. How long had he owed that obligation?

A. Apparently since 1932, when he acquired his stock interest.

Q. And how much was that obligation?

A. Two hundred dollars.

Q. And from 1932 to 1940, he did not pay this obligation of two hundred dollars, is that correct?

A. That's what the statement says.

Mr. Pomeroy: I'll offer Exhibit No.—what is it?

The Clerk: Fourteen.

Mr. Pomeroy: Fourteen.

Mr. Gagliardi: I object, incompetent, irrelevant and immaterial, 1932, two hundred dollars.

The Court: Oh, I think I shall admit it conditionally. From the cross-examination of the witness there was a certain inference there might have been other sources of income. If there was such

(Testimony of Harry O. Swanson.)

testimony in the defense, that would become competent in rebuttal. If there isn't such testimony I will entertain a motion to strike. I don't know why the witness [115] should be held for that.

Mr. Gagliardi: All right, Your Honor. I think Your Honor is correct on that, because surely in cross-examination the agreement itself is sure one of those agreement where a person agrees to purchase stock and then he takes less shares of stock and which forfeits the rest of it when we—

The Court: It will be admitted with the understanding a copy may be substituted if it is an original record.

(Whereupon, the agreement referred to, between Mr. Barcott and the Fishermen's Packing Corporation, was admitted in evidence as Plaintiff's Exhibit No. 14.)

Mr. Gagliardi: May I see the copy?

Mr. Pomeroy: This is a certified copy.

The Clerk: Plaintiff's Exhibit No. 15, for identification. Plaintiff's Exhibit No. 16, for identification.

Mr. Pomeroy: You may step down.

(Witness excused.) [116]

The Clerk: Plaintiff's Exhibit No. 17 for identification.

Mr. Pomeroy: If the Court please, at this time I offer Exhibits 15, 16 and 17, they are certified copies from the Pierce County Auditor, as to these transactions concerning real estate. The reason I

didn't offer them earlier is the fact that we just got them, your Honor. It took some little time to get the Auditor to get them out. And they are the same things that were testified to by the last witness as being some of the things he examined in making his report.

Mr. Gagliardi: I fail to recognize, your Honor, I don't know the purpose except of cluttering the record. Nobody denied that this property he purchased and sold and all that. They make no claim that he made a profit on this sale of property, I don't think, do you?

Mr. Pomeroy: No.

Mr. Gagliardi: Well, there's no profit in this. It is merely cluttering the record. I don't know why it should be admitted in evidence. I don't know why I should object, but it seems to me it confuse the issue, with the instruments when they are in record.

Nobody denied that we had this [117] lot and we sold it. That's all there's to that. And the deed shows that we sold it. If we denied that he sold it, it would be different.

The Court: If they are not material, there is no use to——

Mr. Pomeroy: Are you objecting to them?

Mr. Gagliardi: I am objecting on the ground it is irrelevant and immaterial and merely cluttering the record.

Mr. Pomeroy: They show transactions during the year 1943, '44 and '45 of real estate, by John Barcott, and are part of the record examined by the revenue agent, in computing the figures which he was permitted to testify to here.



The Court: Oh, I think I will admit that.

Mr. Gagliardi: I withdraw my objection if it will make any argument over it.

(Whereupon the certified copies of real estate transactions, taken from the records of the Pierce County Auditor, were admitted in evidence as Plaintiff's Exhibits Nos. 15, 16 and 17, respectively.)

Mr. Pomeroy: The Government rests. [118]

Mr. Gagliardi: If your Honor please, I think that the defendant at this time requests the Court may excuse the jury. I have a very important question of law to present to your Honor. Mr. Ursich and Mr. Hale will present for the rest of the afternoon.

The Court: Well, it is nearly adjourning time, anyway, so I think I shall excuse the jurors until 10:00 tomorrow morning.

You will remember the admonition I gave you at the opening of the trial with reference to talking to anybody or permitting anybody to talk to you about this case. Just go your way now and forget you are jurors until time to report here tomorrow at 10:00 o'clock, and I will excuse you.

(Whereupon the jurors retired from the court room.)

Now you may proceed.

Mr. Ursich: If your Honor please, at this time we are asking this Court to either dismiss this case, or in the alternative to ask the jury to return a verdict of—a judgment of acquittal against the de-

fendant, John Barcott, on the ground and for the reason that the Government has failed to introduce sufficient evidence to show that he has committed the [119] crimes with which he is charged in the indictment.

Your Honor realizes that this is a criminal case, charging the defendant with the commission of a felony. Your Honor further realizes the rules that are applicable in criminal cases; namely, that there has to be evidence introduced of each and every fact before the case can be submitted to the jury for their speculation as to the guilt or innocence of the defendant.

Our taxation system has been so constructed that there is a gradation of penalties and interests, going all the way up until it subsequently reaches a felony level. But, negligence, mistake, or in cases where there is failure of proof, even though there may be a tax due, those cases do not come in under a criminal prosecution. They are matters that can be handled civilly, so far as net worth is concerned, we can see no reason why the Government might not, and as a matter it—in fact it does use a straight net worth basis for the proving of its cases for the collection of tax and penalties thereon. But that your Honor has nothing to do with a criminal case where you have to prove the defendant guilty beyond a reasonable doubt, and where you have to prove a guilty knowledge, [120] and prove each and every fact alleged in the indictment. As the cases have said, you've got to prove that there was a tax

due in those particular years, before the Government can come in and say that you have committed a crime.

Now, I say to your Honor, that you can't do that in a criminal case on a straight net worth basis. You can do it civilly. You should be able to do it civilly. But, you're coming in here—you've got to show a tax due. Now, in all the cases that we have examined, we haven't run in to any that find the defendant guilty in a criminal case on a straight net worth basis. There are cases which go very close to it, but there are none that are as scanty, or without evidence, to the extent that this case is.

You have had here one salient fact, and one only as I see it, and that is that in the years 1943 the defendant purchased some bonds. In the year 1944 he purchased some bonds. And, in the year 1945 he purchased more bonds. These bonds, these purchases of bonds are greater than the amount of his income for those three years. Therefore, the Government assumes, mind you, and only assumes that the income must have been earned during those three years. Now, I say to [121] your Honor, looking back during those three years, how many men would you have had facing the bar of criminal justice who bought the full maximum of bonds during those three years and never reported an income to equal the amount of the purchase of bonds. How many American citizens dipped into their savings during those years and made purchases greater than their income. They must number in the millions. And that's the basis of this case for

the Government; because the man bought more bonds during those years than he reported income, they assume and speculate that he must have made the money during those years. I submit to your Honor that's all you've got to go on in this case, and where are you going to determine that he owed a tax on that basis and on that basis alone.

Now, there are cases where the Government has actually shown certain items of income that have never been reported. They have actually been able, for example, to trace an item and say, "Here is an item which you received as income from that year. It has never been reported in your tax returns." Now there is specifically an item that they say has been received. There are lots of cases like that where they show an asset, money received, that wasn't reported, but they trace [122] it. In this case we have no case of income unreported which the Government has been able to put the finger on and say, "There is an income, an item of income unreported; therefore, you must have owed a tax on it." There is no income here. It's just a matter of outgo. Nothing more than the fact that there was a purchase of bonds in a greater sum than we earned. It is reasonable that this money was earned in a period of thirty years by this defendant. It is very reasonable that a great deal, if not all of that money, was purchased in years earlier. There is nothing from those reports that show that he violated—or that he failed to report his liability, his full tax liability to the Government from the failure—or, from the purchase of a greater amount of bonds than income that he had in those years.

There is not one case, I say again to your Honor, that we have been able to uncover, a criminal case I mean, I do not mean a civil case, that goes on a straight net worth basis and where they can't particularly point to a certain item of income that wasn't reported in the year in which they are trying to assess the man for the tax and which they are trying to find him guilty of a felony. [123]

I say again, income actually received, not reported, coupled with other facts, has made cases in criminal prosecution; but on a straight basis, not showing any income, just relying on an expenditure alone, saying he must have had more, how did he buy it, and I remind you, remind your Honor that this is a criminal case, that we do not have to explain, they have to prove. It's not a burden on the defendant to prove and to tell the Government whether or not he had this money beforehand. They've got to prove he didn't have it. And they've got to prove that the tax was due in those years.

Now, the evidence offered before your Honor today, is this of such a nature that this Court can say that there is only one hypothesis, and that is guilt? Can your Honor say that the purchase of more bonds in any of those three years indicates a fraud to the Government, and that there was a tax due during those years? I submit to your Honor that you can't, or any other living human being can so do. I have a case here—I feel there's no need to cite the name of the case, the books are full of the particular quotation with reference to whether or not a case should be sent to the jury on circumstantial evidence. [124]



Our courts have repeated this hundred of times in criminal cases. "Unless there is a substantial evidence——"

Mr. Pomeroy: What is the citation?

Mr. Ursich: Yoffey against United States, 153 Fed. 2nd, 570.

"——unless there is a substantial evidence of facts which excludes every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial evidence is in as consistence with innocence as with guilt, it is the duty of the appellant court to reverse the judgment of conviction." I cite that case only for that rule of law, and nothing else. It follows through our entire Federal jurisprudence.

Where a case is presented on circumstantial evidence, this Court has got to say that the evidence excludes every other hypothesis except guilt. This Court has to say that when John Barcott purchased more bonds in 1923 than he reported income, that that indicates exclusive of every other hypothesis that he defrauded the Government of the United States.

That's what your Honor has got to determine to submit this case to the jury. I submit to [125] your Honor that it isn't here. Well, there may be tax liability. I don't know. But, that's a different matter. Here you have a man who after thirty years of living in this city, conducting himself as an honorable man, comes before the bar of criminal justice. On what? On speculation, on inference, and



nothing more. It's just as reasonable that he made these purchases out of money that he acquired before. Your Honor is the guardian of the rights of the people. I feel that your Honor is familiar with all that I have told him today. I feel further that your Honor is not going to permit an infringement in the fields of criminal law on what I maintain is no evidence whatsoever.

It may be set out by some that there is some evidence. Assume that there is, without admitting, some evidence, it doesn't square with the hypotheses of guilt and nothing else. And that's what your Honor is bound to determine today.

If the defendant owes a tax, he's got to pay it. He's got to pay it with penalties, or whatever it is, but that's not the question today. We only have one question—did they make out a case? It's on circumstantial evidence, nothing else. The circumstances in this case are just as consistent with innocence as [126] they are with guilt. And being so, this Court can do only one thing, as I see it. It can determine that there has been no proof. If there is any tax due in those three years, the corpus of this case has not been established, and I ask the jury to render a judgment of acquittal.

I don't know whether Mr. Hale has something further to add on what I've said.

Mr. Hale: If the Court please, I think Mr. Ursich has covered the point quite thoroughly. However, I have one case I would like to invite your Honor's attention to. That is *Nicola vs. the United States*, an appeal from the Third Circuit, 72 Fed. 2nd, page 780.

In that case there was substantial evidence that the defendant had arbitrarily allotted to one of his corporations, a commission on the sale of patent rights in the sum of a hundred thousand dollars. And an argument arose as to whether or not he should have allotted this before the negotiations or afterwards. He frankly took the position that the bargaining did not have to proceed the actual transfer of the money. Now, the Court in reversing a conviction in the lower court—incidentally he wrote a letter, [127] although it wasn't admitted in evidence, but there was a controversy over the letter, but the allotment of various income in several corporations was referred to as "shifts" and "passings." At page 786 the Court says: "But if the shifts and passings represented facts and real transactions, the operation through his different corporations, rather than individually and personally, or the shift from operating through a particular corporation in one enterprise to another corporation in another enterprise, in order to lower his tax right, he was within his legal rights and was not guilty of violating the law.

"In view of the fact that there is no evidence showing that any entry in any or all of the books did not represent the fact which it purported to represent, or that there was an alteration of any entry or that there was a false entry in any of the books, it is reasonable and legal to infer that he made shifts and passings within the law." And they quote the elementary rule of criminal law.

“Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused.” I repeat this [128] language, “unless there is a substantial evidence of fact which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused. And where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.”

This, if your Honor please, is an income tax case. Now what are the assumptions in which the Government engages here? The Government engages, in order to prepare its figures, that in 1919 John Barcott was absolutely penniless, without a dime, he didn't have anything, or perhaps he was suddenly materialized into existence on that date. The Government's principal witness, and there is reiterated in this Court, in this case, time and time and again, that this whole case is founded upon a theory of net worth. And the net worth is based upon the assumption that this income occurred in 1942, 1943 and 1944—I mean, the years '43, '44 and '45, solely because he purchased bonds during those years.

Now, is the Court at liberty to allow this jury to speculate upon a matter of that kind? That's all it amounts to. Is the Court at liberty to tell [129] the District Attorney of the United States that “if you can go out and find any man who has spent more money in a given year than his known assets.

you can send him to the penitentiary. Just find expenditures in excess of what you deem to be his income, and you don't need to prove anything else."

Now, if your Honor please, all of the cases which we have been able to find showed conclusively that the Government's case is bottomed on something. It's laid upon a foundation of a net worth as of a given date, and in establishing the case from there on they must show an increase in the net worth from that given date. Most of the cases showed bank statements. Most of the cases show that on a certain day the defendant told the bank in order to borrow money that he had so much money—listed his assets. And from there on in the Government, of course, can show income by cash in hand paid to them, by checks; and that coupled with large expenditures, establishes a net worth case.

Incidentally, if your Honor please, the term net worth is a catch phrase used by the Internal Revenue. It is not a judicial expression. That's how they characterize it, but the courts don't so characterize it. True, the expression is used, but [130] no court has said, "If we can show a net worth on a certain day, or if you can show a net worth on a certain day without showing income, that you got a case."

In the case at bar there is absolutely no predicate laid prior to January of 1943. That is all assumption. That's way up in the clouds. That's guess work. The Court would have to indulge in a negative assumption that this man—this man was penniless prior to that time, in order to submit this case to the jury.

Now this is a criminal case. Every element of the crime must be proved by the Government. We stand here presumed innocent throughout all stages of this trial. It seems to me, your Honor, that the Court has no alternative, no other alternative but to take this case from the jury at this time.

The Court: I shall have to deny the motion and allow you an exception, and I might state in passing that I am not finding fault with the argument advanced by either counsel as to what the law is, when we come to instruct the jury. The case cited by you, Mr. Hale, is a part of the substance of an instruction—the Court gives almost a stock instruction on the weight to be given circumstantial evidence when circumstantial evidence is relied upon, but in order to grant a motion [131] such as is made in this case, either to dismiss the action for want of proof or to direct a verdict of not guilty, the Court must assume that the proof is totally lacking in making an issue of fact for the trier of the facts to determine. Had the Court the responsibility of passing upon the facts that would be an entirely different situation and the argument would be very apropos. It is not for me to comment in passing whether this theory of so-called net worth is the proper basis under a set of facts such as are disclosed here, where there was a business that was, through the years that are mentioned here, apparently quite a profitable business, but such records as the Internal Revenue Department require from time to time—the testimony of one of the Internal Revenue agents was that they were not available—were not being kept.



Now whether the circumstance that the net worth year after year, through the three years here is one where you can say the inference is equally as great pointing towards innocence as it is guilt as a matter of law, is quite a different situation, and I couldn't say that because that is a question for the trier of the facts to determine under the proper instruction to be given. The question as to whether it will be a civil liability or a criminal liability is sometimes identical. The only difference there is, is, the weight of the [132] evidence. One is proof beyond all reasonable doubt and the other is proof by the greater weight of the evidence. In fact the case—and I can't give it to you at the moment—the Supreme Court of the United States passed upon that identical question where the taxpayer was tried and he was acquitted on a charge such as you have here. The department sought to levy the tax and the penalties—fifty per cent penalty, and the case went to the tax court in the first instance but finally wound up in the Supreme Court of the United States, and Justice Brandeis wrote the opinion and said that the criminal case is not *res adjudicata* of the civil case, even though the same charge is made. And so here, when we compare criminal liability with civil liability, we must always recognize the distinctions between the weight of evidence or the proof required, and the defendant must always in a criminal case be given the presumptions of innocence, but to say under the state of this record as made here now—and I must accept it because it is not controverted, that it leaves no issue of fact at all to the



trier of the facts would be an assumption of authority I am afraid that the Court hasn't the right to take, even in a criminal case, and I shall have to deny the motions—both motions and allow exceptions, and we will proceed with the defense tomorrow. [133]

How long do you think it will require for the defense, before you get the instructions?

Mr. Gagliardi: After the adjournment, your Honor, we may consult—we may not introduce any evidence, and we may. If we do introduce evidence it will take all day tomorrow. We may decide to stand on the record as it is made, because of our opinion concerning the sufficiency of the evidence, and may not have to have, but we won't know until morning. I want to consult with counsel.

The Court: Of course that is your privilege, but I would like, if you have any requested instructions that you want submitted to the jury, you get them. I would like to have them—the Government's, now.

Mr. Pomeroy: I will send them into your chambers.

The Court: And serve them on counsel.

Mr. Gagliardi: I will have them the first thing in the morning, your Honor. I don't know that they have prepared any instructions. There are two or three instructions I prepared, and I don't know how many more they have prepared themselves. We will have them early in the morning.

Mr. Ursich: If your Honor please. I have discussed this matter with Mr. Pomeroy of taking two or [134] three exhibits, so we may examine them this evening—

Mr. Pomeroy: I have no objection.

Mr. Ursich: There are some from the bank. We would like to look them over.

The Court: Yes. If there is nothing further, adjourn court until 10:00 o'clock tomorrow morning.

(Whereupon adjournment was taken until 10:00 o'clock a.m. October 31, 1947.) [135]

October 31, 1947, 10:00 o'Clock A.M.

The Court met pursuant to adjournment; all parties present.

The Court: Now, if there is nothing further before the jury comes in—Mr. Gagliardi, do you have anything further?

Mr. Gagliardi: I was going to ask, if Your Honor please, just a few minutes to renew our motion for non-suit. That is the requested instructions.

The Court: Are they in duplicate?

Mr. Gagliardi: I can give it to Your Honor in duplicate, but I have it—This is the original, Mr. Clerk.

The Court: Just pass them up.

Mr. Gagliardi: The defendant, I—if Your Honor please, I would like to renew our motion for dismissal of the action for the reason that the evidence were insufficient, or they are insufficient to submit it to the consideration of the jury. The argument made by counsel yesterday failed to point out to Your Honor a very important feature of the case, and that is this: This defendant is indicted for having reported less income than which he actually made, but the Government [136] limited the source

of this income, and that is the Government in the bill of particular, specified exactly where this income—this income came from, and that is first in this bill of particular, and the bill of particular is part of the indictment, and the Government must of necessity limit itself to prove an indictment no farther than that. We are not called upon to defend anything else.

Now, the indictment in the bill of particular says this: "The source of income were dividends from stockholding, Fishermen Packing Corporation of Anacortes; interest was from Government bond Series "G"; interest from saving account in the National Bank of Washington, and from a real estate contract and conditional sale contract for the sale of personal property, in each of which Anton Barcott was the purchaser; item interest on bond, was from the Government bond; item income from business, is from the restaurant business known as the California Oyster House, 940 Pacific Avenue, Tacoma, Washington."

Now, that's the indictment itself. And I say to Your Honor that there isn't a *single of* evidence that this income came from any sources. All the Government has here says that on January 1, 1943 [137] the defendant had a certain amount of assets, and that at the end of the year he had a larger amount of asset than his reported income. That not necessarily mean that this defendant derived this income from the restaurant, nor that he derived from this interest unless they prove it. Now, the interest amount is reported on the income itself.

The amount which the Government says he earned is reported, because it's in evidence. The amount of business reported from the California Oyster House is reported in that income tax return; but there is no evidence here wherein the Court could say to this jury that this defendant's income was from the California Oyster House and no other sources. And this is a criminal case. It is not a civil action. It's a man is put here in jeopardy for his liberty, and the Government must prove beyond a reasonable doubt every allegation in the complaint. And what are the allegations? That he derived this income from sources, the California Oyster House. And I defy counsel on the other side, or I defy any person, to point out a scintilla of evidence here that this income was from this sources and no other sources. Suppose he had some other business; suppose that he had [138] gambled; suppose that he stole the money; or suppose that he had some other income from some other sources which he should pay tax on it; yet, it is not reported and it is not made in the indictment, and Your Honor has no right to send this case to the jury and say to the jury, "You speculate, conjecture, wherein this income come from." The proof must be certain, the proof must be beyond a reasonable doubt, and the function of the Court is to the jury—take the case away from the jury when there is no evidence upon which to base a verdict.

What are the evidence here? Not a scintilla of evidence, Your Honor, that this income was derived from the California Oyster House, or any other

evidence. All the Government bases his income—his case wholly on net worth. Then he says on the first of the period which we are indicating this defendant, he had assets to a certain amount, at the end of the period he had—his assets were a certain amount, therefore his income was somewhere else. But where? From what sources?

We are asked in the bill of particular to tell us what sources we derived this income. And they come to and says, "this is the sources which you derived it." But, they failed to prove it.

And I say to Your Honor, sincerely, after [139] giving all this thought, and all night, that there isn't a scintilla of evidence, in justifying this case to be sent to the jury to speculate as to whether or not this defendant actually made that money in that restaurant or whether he got it some other places.

If he did get it in some other places, if the evidence were here that he got it from some other places, it would be your duty to tell the jury that was not admissible. He was bound to confine itself within the indictment, and no further; within the bill of particular, and no farther. And I say, Your Honor, that the evidence here is nothing. I've witnessed nothing in my thirty-two year of practice of law, I never find a case where the jury would be allowed to speculate, to conjecture, to guess, and to say that this come from a restaurant when there isn't a scintilla of evidence, and not a word that it was come from this particular sources.

I say, Your Honor, that the motion for non-suit, a dismissal, should be granted.



The Court: Mr. Gagliardi, I may say that when the motion for a bill of particulars was made here, the Court was in grave doubt whether a bill of particulars should have been furnished. Granting or denying the bill of particulars is a purely discretionary [140] matter with the Court, but in this case there was grave doubt as to whether the Government could particularize with the degree that it frequently can when it makes a charge, because the defendant himself, not having kept his books of account and records, in compliance with the Internal Revenue law, on the civil side, and in the regulations that are made for the enforcement of the Internal Revenue law, and I think an examination of the record when this application for the bill of particulars was before the Court, would indicate the Court did not mean to so limit evidence that upon the indictment itself, proof could no be made to support the allegations of the indictment.

I might suggest to counsel that in the earlier days of the practice of criminal law, the office of a bill of particulars in the Federal Courts was more strictly construed than it is under the new rules of criminal procedure, and likewise under the new rules of civil procedure. The Government is not required to prove the shortage in the return was the exact sum that was set forth.

Mr. Gagliardi: I think Your Honor construes the law more liberally than counsel for the Government. The Government says that it must be a [141] substantial amount, and whether a substantial amount is not fifty dollars or seventy-five dollars



when we are charged here with defrauding the Government of five or six thousand dollars, you cannot base a criminal prosecution on that basis alone.

The Court: I don't know what the Government said in that regard. I was just pointing out to you that it is not incumbent upon the Government in this charge to prove the exact figures.

Mr. Gagliardi: Your Honor mean to say then that the bill of particulars may deceive the defendant in believing that is all he must confront himself with, to prove and disprove; that the bill of particulars may be——

The Court: I am not dealing in generalities, Mr. Gagliardi: I am speaking of the case that we have before us, and the way that that motion for a bill of particulars arose.

Your motion will have to be denied and an exception allowed. Bring in the jury, Mr. Bailiff.

(Whereupon, the jurors resumed their seats.)

The Court: Now you may proceed with the defense. [142]

Mr. Ursich: If Your Honor please, ladies and gentlemen of the jury, yesterday you heard the Government put on its case, purported to prove the defendant, John Barcott, attempting to show to you that he had wilfully and knowingly attempted to defeat and evade his taxes for the years 1943, 1944 and 1945.

Although this attempt on the part of the Government to prove that—those facts is, we believe, based completely on conjecture, speculation, and as-

sumption, and nothing else, we still want to introduce evidence to you people to show you that even, that speculation, and that conjecture——

Mr. Pomeroy: If the Court please, I'll object at this time. I think this is for the purpose of showing what evidence he is going to put on.

The Court: Yes.

Mr. Ursich: We intend to prove to you this morning by the—that the defendant, John Barcott, in the year 1945—or, 1919 entered the restaurant business in the City of Tacoma, the same restaurant which he now has, the California Oyster House, that at the time he entered into that business he had [143] a certain amount of money which he had previously earned. Not a great amount of money, but about five or six or seven thousand dollars—I don't know exactly, but the proof will be shown in that respect—but he had that money when he went into the restaurant business in 1919; that he went into that business and he continued through it up to the present date, or until his son came back from the service and has taken over the business.

The evidence further shows, that during all these years that John Barcott was actively engaged in the operation of that business; that he worked there days, year in and year out; that his wife worked there, from the year 1920 until the year 1938; that in the year 1928 his son, who was fourteen years of age, came down to the restaurant and that he worked in that restaurant up until the time that war was declared and when he went into the service, and that he is now back there again.

The evidence will show that these people lived very, very frugally. It will be pointed out to you that in, during all of this time the defendant has never owned an automobile, that he has no vices of any kind, no place where he spends any money. It will further be shown to you that the defendant's wife ran a [144] very close home; that clothing for the children was even in the early years purchased from second-hand sources; and that these people were thrifty, and in the highest type of legality have over a period of twenty-five or thirty years accumulated a little money.

The evidence will further show that in all these years that this business was being operated that the defendant was making money, two hundred and fifty, or three hundred and fifty, or four hundred dollars a month. Time has gone by, many years have gone by, and it's difficult to tell what the earnings were for any month; but the—generally it can be said that this business made some money through the efforts of this family, every month he made a substantial amount, which money was not spent, but which money was carefully saved over a period of many years.

The evidence will further show that at the time Mrs. Barcott married this defendant that she had approximately six thousand dollars in cash which was put together with what the defendant had at the time.

We will further show you that sometime in the late twenties the defendant received the sum of twenty-five hundred dollars at the time of the death

of Mrs. Barcott's mother. Also during this time, somewhere in the late—1929, we will show you that Mr. Barcott purchased an interest in a fishing boat for approximately five thousand dollars, and that he had an interest in that boat for seven or eight or nine years, that during that time he made eight or nine thousand dollars, that is, he received from that boat eight or nine thousand dollars from his earnings, approximately; that he did sell the boat subsequently at a loss—he lost three thousand or thirty-five hundred dollars from the actual sale price of the boat, but that during those years he did have an income from it that amounted to eight or nine—maybe ten, I don't want to say just what, without knowing. It's been a long time ago.

But we will show you that the defendant had these sources of income in the early days. We will show you further that during the years that Mrs. Barcott spent in that restaurant that she received a source of income which she did not, and Mr. Barcott, did not report to the Government. Maybe they were supposed to report it, but they never thought that the money she received from tips was reportable income. Mrs. Barcott was in that restaurant for eighteen years, and the testament—testimony will show from the evidence introduced here [146] that at that restaurant she was able to make anywhere from five to ten dollars a day, sometimes more, in tips, in gratuities that were given to her from patrons in that restaurant. She will show to

you by her testimony that this money was used to operate all of the expenses of the family and that there was even some left over, a good deal was left over, was returned to Mr. Barcott and it would go in the savings, and that none of the money which they got from the restaurant, actual restaurant operation, had to be used for family purposes or for living purposes.

The evidence will show that over a period of that time that money amounted to a considerable amount, thirty to forty thousand dollars, that she received during the eighteen years, during her efforts in operating that Oyster House.

So, when we complete our case, I think we will show to you conclusively that the present worth that the defendant has was not acquired, as the Government would have, tell you, was not acquired during the years '43, '44 and '45, but was acquired over a period of twenty some odd years by the diligent effort of Mr. Barcott and Mrs. Barcott, and that a good portion of that income was saved by reason of the fact that [147] Mrs. Barcott was in that restaurant for eighteen years as a waitress and that she received substantial moneys in tips, which made it possible for these people to accumulate by the year 1942, or before this was brought, total assets of ninety or a hundred thousand dollars, or sixty to sixty-five thousand dollars was payable.

And when you've heard us, ladies and gentlemen, we expect you to return a verdict of "Not Guilty" and return this man back to his family.



## JOHN BARCOTT

the defendant, after being first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Gagliardi:

Q. State your name to the Court and jury.

A. John Barcott.

Q. How old are you? A. Fifty-four.

Q. Mr. Barcott, where were you born?

A. I was born in Yugoslavia.

Q. When did you come to Tacoma?

A. 1913.

Q. And when you came to Tacoma, what business, if any, or [148] what occupation did you enter into?

A. I went a fishin'.

Q. What do you mean, fishing business?

A. Fish—in the fish business and Forsama—I was fishing with—on the “Forsama.”

Q. You mean you went out on the sea fishing?

A. Yes.

Q. Fishing vessel? With other crew?

A. Yes.

Q. And for how long a period of time did you do fishing?

A. From 1913 to part of a 1919, before I went to business.

Q. And in 1919, did you go in any other business?

A. Yeah, in 1919 I went in a business.



(Testimony of John Barcott.)

Q. What kind of a business?

A. A restaurant business.

Q. How much money or cash did you have at the time that you entered the restaurant business, which you earned in the fishing business?

A. I got about six thousand dollars.

Q. Six thousand dollars. And did you go into the restaurant business—did you buy a restaurant which was already in existence?

A. Yes.

Q. Who did you buy it from? [149]

A. I buy it from the fella—he's a Greek fella.

Q. Do you recall his name?

A. Huh?

Q. Do you recall his name?

A. His name was—the first name I knows a Gus, but I can't tell you last name.

Q. And did you pay for the restaurant?

A. Yes, sir.

Q. How much investment did you make when you purchased the restaurant?

A. Well, it cost about three thousand dollars.

Q. And who purchased the restaurant, you and anybody else?

A. There was a fellas with me.

Q. There was a fellow with you?

A. Yeah.

Q. Was he a cook?

A. Yes.

Q. And did you take him as a partner—

A. Yes.

Q. —to go in business together? And how much you two spend, about three thousand dollars?

A. Three thousand dollar.

(Testimony of John Barcott.)

Q. How much was your investment?

A. All my investment was there. [150]

Q. Well, who advanced the money then, for the purchase?

A. I'm the one that financed the money.

Q. And how long did you stay in restaurant partnership with this man?

A. Well, about three or four months.

Q. Three or four months. Who was the man?

A. It's Vincent—Vin—I can't tell you last name, you know.

Q. Victor. Was he a Greek fella?

A. Well, no, he was Slavonian fella.

Q. Slavonian. You recall his name?

A. Yeah, Vince—Gomway, something like—I can't tell you who—really his last name.

Q. After three or four months then, did you purchase this interest in the restaurant?

A. Yeah.

Q. How much you paid him? If anything?

A. I never paid him, not a thing.

Q. He then left the restaurant with the amount which you paid.

A. He left the restaurant, yeah.

Q. Did you then have any other person go in partnership with you? Did anybody else come into partnership with you, in the restaurant? [151]

A. At that same time?

Q. Yes. After this man got out.

A. Well, this—yeah, I got my cousin.

Q. Your cousin. What was his name?

A. John Orb.

(Testimony of John Barcott.)

Q. Orbed. And did you sell a half interest to him?      A. Huh?

Mr. Pomeroy: What's his name?

Q. What's his name?      A. John Orb.

Q. John Orbed      A. Yeah.

Mr. Pomeroy: How do you spell it?

Q. O-r-b-e-d?

A. Yeah. O-r-b.

Q. O-r-b?      A. Yeah.

Q. Orb. And did you sell half interest to him?

A. Yeah, I take him the partnership.

Q. How much he pay you for the half interest.

A. He no pay nothing in the start.

Q. How long did you stay in partnership with him?      A. He was with me six years.

Q. That mean up to 1926? [152]

A. '26. That's right.

Q. And during the first four months that you stayed with the first partner, did you two make any profit?      A. Well, we made.

Q. How much profit did you make?

A. I made hundred dollar—couple a hundred dollars a month.

Q. Couple hundred dollars a month?

A. Yeah.

Q. Were both of you working in the restaurant then?      A. Yes.

Q. And then when you got into partnership with Mr. Orb, did you make any profit?

A. Yes, sir.

(Testimony of John Barcott.)

Q. What would be the profit that you made from that period?

A. We both we was doing cooking, and we make about two fifty to three hundred dollars fifty.

Q. Each, or both of you? A. Each.

Q. Were both of you working in the restaurant?

A. Yes.

Q. What hours did you work?

A. I worked—I was working nights; he was working daytime for a while.

Q. How many hours a day? [153]

A. Well, about ten hours a day.

Q. And the restaurant is open night and day?

A. Well, they was open to late at night, yeah, two, three o'clock in the morning.

Q. And was Mrs. Barcott came into the restaurant? A. Yes.

Q. When did you and her got together?

A. She started to work 1920.

Q. '20. That's the time when you and her got together? A. Wha—we was——

Q. Was she your wife before that?

A. Huh?

Q. Was she——

A. Yeah, we was living together.

Q. And that was the time that she come to the restaurant? A. Yeah.

Q. And what did she do in the restaurant?

A. She was a waiter.

Q. A waiter on what, on the table or on the counter?

A. Table—well, yeah, tables and counter.

(Testimony of John Barcott.)

Q. And did the partnership pay her a salary?

A. Yes——

Q. Or wage, for her work?

A. She was drawing twenty-five dollars a day.

Q. A day, or——

A. I mean, shift—I mean twenty-five dollars a week, pardon me. I'm sorry.

Q. And that was coming out of the partnership?

A. Yes.

Q. It was paid to her.                      A. Yes, sir.

Q. Now when you and Mrs. Barcott got married, did she have any money?                      A. Yes, sir.

Q. How much money did she have?

A. She got close to six thousand dollar.

Q. And what did she do with the money?

A. She was keep it for a while, then after while when we got the box she give it to me.

Q. And where did you put it?

A. I put 'em in the box, saving box.

Q. And where do you put your money?

A. My money?

Q. Yeah.

A. When we got the box, we was put 'em in the box; but before I was keeping cash in my home.

Q. You didn't trust the bank? Is that it?

A. No, sir. [155]

Q. Did you——

The Court: You better show the date when they were married, whether it was before or after——

Mr. Gagliardi: I big your pardon, Your Honor.

(Testimony of John Barcott.)

The Court: You better show the date when they were married, whether it was before or after.

Q. What—were you married before 1920, or after 1920?

A. No, around 1920—twenty—I think '21, something like that.

Q. And before you got married, was she working in the restaurant?

A. She was working in the restaurant.

Q. And you got married between 1920 or 1921?

A. Yeah.

Q. And how long did she stay working in the restaurant?

A. How long you mean——

Q. How many years did she work there?

A. How many years?

Q. Yeah.

A. She worked from 1920 to 1938.

Q. Now after 1926, did she receive any more wage, or salary? After you had parted with your partner?

A. No, she never received a salary. [156]

Q. What did you do with the profit that you made, if any?

Mr. Pomeroy: Just a moment. What was the answer to the—what year did you say?

Mr. Gagliardi: 1926, after the partnership dissolved.

Q. After you and your partner dissolved, and you purchased your cousin out, then your wife worked there just the same? A. Yes.



(Testimony of John Barcott.)

Q. Did she receive any wage?

A. No that time.

Q. And what did you do with the profit of the restaurant, if any?

A. We keep it together.

Q. Keep it together. Where did you put it?

A. Put 'em in my saving and saving deposit box.

Q. Did you have a safe hole in your restaurant?

A. Yes, yes, all the time.

Q. Did you at any time use bank account for putting your saving in?      A. Yes.

Q. What did you use the bank for?

A. Well there's no bank goes—simply the Tacoma Savings, Loan and Saving, I got something saving there. [157]

Q. How much did you put in there?

A. That was, I think, around twenty-five hundred dollar, something like that.

Q. Twenty-five hundred dollars?

A. Yeah, or more, I don't know——

Q. What year was that, you put it in?

A. Well, it was—I can't tell you sure.

Q. Was it before the depression or after?

A. Oh, before the—oh, yes. Quite a bit before.

Q. Way before the depression.

A. Way before, yeah.

Q. And what did you do with the money that you made in the restaurant?

A. I keep the cash.

Q. Where did you put it?

A. Put it in the saving box.

(Testimony of John Barcott.)

Q. In the safe deposit box?

A. Safe deposit box, and my safe, part of it.

Q. And during the time that you was running the restaurant, what was your job there, what were you doing?

A. First, I was a cook for years there.

Q. How long—after your partner got out?

A. I was—yeah, after partner got out, I was cookin' to 1932 or '33. [158]

Q. '32 or '33.

A. No, but I was cookin', I was taking care of the cooks.

Q. Were cooking. How many hours a day did you work?

A. I was workin'—I come in five o'clock in the morning to about four or five in the afternoon.

Q. And then somebody else took the shift in the afternoon?

A. In afternoon and rest of the night.

Q. And what was your wife doing at that time?

A. She was working nights.

Q. She was working there nights?

A. Yeah.

Q. And how many hours did she put in, in the restaurant?

A. She put in long hours, I know that.

Q. Well, what do you mean, long hours, ten, twelve——

A. That was nine, ten hours, depend how's a busy, you know. If it was a busy, she was there all the time, but no less than nine hours—I mean, original, and more if it was needed.

(Testimony of John Barcott.)

Q. And more if you need it. A. Yeah.

Q. And who else was working in the restaurant after 1928? A. You mean——

Q. Just a minute. I withdraw that question. Do you and Mrs. Barcott have any children? [159]

A. Yes.

Q. How many? A. Three.

Q. What are they, boys or girls?

A. Two boys and one girl.

Q. Two boys and a girl. Now, who was the first one born, the boy or the girl?

A. There is one that came here from back in Europe, 1925. That's my boy.

Q. That's your own boy?

A. My own boy, yeah.

Q. That was not the son of Mrs. Barcott.

A. No.

Q. And what's his name?

A. Anton Barcott.

Q. Anton? A. Uh-huh.

Q. And how old was he when he came here in 1925? A. Twelve years old.

Q. How much?

A. Twelve—twelve years old.

Q. Twelve years old. And he got here in 1925?

A. Yes.

Q. And what did he do after he got here? [160]

A. And he was a goin' to school for a couple of years. About a year or two, something like that.

Q. And then——

A. And between that time he wasn't going to school, he was down at place too, you know.

(Testimony of John Barcott.)

Q. Well, what time would he come to the place?

A. Well, after the school, for a couple of years, he was washing dishes there.

Q. Washing dishes after school hours?

A. Yeah.

Q. And after he quit school, what did he do?

A. Then was washing dishes, working there, something like that.

Q. You mean, he come to work in the restaurant?

A. Huh?

Q. You mean to say he came to work in the restaurant?

A. In the restaurant. A regular steady job.

Q. And did you pay him any wage?

A. Not till he get married.

Q. And how many of your family were working in the restaurant all these years? How many of you?

A. There was three steady there, for years.

Q. And what was your profit, or your income, during those years, per month, an average—not less than a certain [161] amount and no more than a certain amount. What was it?

A. Average was running from three hundred—two fifty or three hundred to four hundred dollar, depending hows season's business is.

Q. Well, you say that you never made less than two hundred and fifty—

A. Two hundred fifty dollar, never less.

Q. That is, the three of you never made that much—less than that? A. Yeah.

(Testimony of John Barcott.)

Q. You didn't pay your son any salary or wage, I understand?      A. No.

Q. You didn't pay your wife anything?

A. No.

Q. Was there any other children working in the the restaurant?

A. There was a youngster, but he was there four or five years—John.

Q. John.      A. John.

Q. How old is John?

A. Oh, the John is a twenty-three right now.

Q. Twenty-three.      A. Yeah.

Q. And he been working there too for many years? [162]

A. Well, let's see, he was there, start to work, he went to school—when he finished the first school, he didn't a want to go to school any more.

Q. Yeah.      A. So I'm put him to work.

Q. Put him to work where? In the restaurant?

A. I can't—yeah, in the restaurant, that's right, in our place.

Q. And did you pay him any wage?

A. No, sir.

Q. Is that the custom of your country?

A. That's the custom—he was in my family—I don't know, somebody else might, but in my family.

Q. And then what did you do with the profit that you made in those years?      A. I save it.

Q. And where do you put it?

A. Put it—some of it in the saving box. and some of it in my safe.

(Testimony of John Barcott.)

Q. Kept it in cash?           A. Cash.

Q. Who paid the running expenses of your family, that is, the house expenses?

A. My wife.

Q. And where did she get the money? [163]

A. She get the money on the tip.

Q. Tip?           A. Tip. Yeah, that's right.

Q. And did you get anything from the restaurant in the way of food, that you fed your family with?

A. Yes, I used to take care—take food from restaurant, take it home.

Q. What food would you take home?

A. Meat, all kinds of—you know, can stuff, anything they needed.

Q. You take it home?           A. Yes, sir.

Q. And Mrs. Barcott paid all of the home expenses out of her tips?

A. From her tips—payment of the house, everything that's supposed to come in on the home, that belonged to home.

Q. The net earnings of the business, then, was all put away?           A. Yes, sir.

Q. Now, what kind of a house have you got? How big is it?

A. It's about kitchen, one bedroom downstairs, and a front room, and two little bedroom upstairs.

Q. How much did you pay—when did you buy the house?           A. 1926. [164]

Q. How much did you pay for it?

A. Thirty-one hundred dollars. Thirty-one, something like that, yeah.



(Testimony of John Barcott.)

Q. Did you make any improvement on the house since then?

A. I make some of improvement.

Q. What improvement did you make?

A. I made an improvement, little bit on the inside, I turned the kitchen a little bigger, and on outside the—those what's the name—

Q. Bricks?

A. Bricks—covered with bricks.

Q. Covered with imitation bricks?

A. Yeah. That's it.

Q. How much did you spend on improvement of the house, all told, since 1926?

A. Well the most be around three thousand dollars or more—I can't tell you sure how much. I can't tell you.

Q. In improvement?

A. An improvement, yeah.

Q. How much the whole house cost you?

A. You mean altogether, improvement and everything?

Q. Yeah.

A. Well, I pay for house, thirty-one hundred dollars, and there's the improvement about six—six thousand, two, [165] three hundred dollars.

Q. How much of furniture you got in the house? How much? What's the furniture?

A. Well, what is the furniture worth? I ain't got no first-class furnish—I can't tell you sure, Mrs. Barcott was take care of it, that part.

(Testimony of John Barcott.)

Q. She purchased the furniture for the house?

A. Absolutely.

Q. Now, do you have any automobile at any time, all these years?

A. No, sir.

Q. Do you smoke?

A. No, sir.

Q. Do you drink?

A. No, sir.

Q. Do you gamble?

A. Absolutely no.

Q. Do you—what do you do for diversion, if anything?

A. I was working, like a slave, that's what I was.

Q. And that's your diversion?

A. That's all. That's only kick out of it, I was there to do the work. All those years.

Q. You don't have an automobile now, do you?

A. No, sir.

Q. Did your wife buy any expensive clothes, or did you buy [166] her any?

A. No, sir, she—

Q. How often would you buy a suit of clothes yourself?

A. Myself?

Q. Yeah, how often?

A. My suit of clothes for me four, five, six years.

Q. How old is that suit you got now?

A. It is about six years old, before the war.

Q. What other clothes do you wear besides this suit?

A. A uniform I was wearing most of the time—uniform down there, white coat and white apron, I was—and pants, I was working every day, every day in the year, all those years.

(Testimony of John Barcott.)

Q. And what—do you know what would be the expenses of running your home? Do you have any idea?

A. I got no idea; Mrs. Barcott was take care of it.

Q. Now, in 1940, did you have any knowledge how much money you had put aside?

A. I got a pretty good money, I know that that I got pretty good money, but I can't tell you, figure how much it was.

Q. Well, how much, more——

A. I can't tell you—I can't tell you sure how much was there.

Q. How much did you have on January 1st, 1943, do you have [167] any idea?

A. I—I tell you, I got no idea really how much money I was a saving on that cash.

Q. All of your earning and profit went into the safe deposit box?

A. Yeah, and I was keeping a safe and a safe deposit box.

Q. Did you buy any war bond or Government bond prior to 1942?      A. Before 1942?

Q. Yeah.      A. I bought in 1937 some bonds.

Q. What kind of a bond were they?

A. They was a baby bond, you call it, I think.

Q. And where did you put them?

A. I put them—ah, saving box.

Q. And did you buy any bond in 1942?

A. I believe I—I don't know sure, I think I did?

(Testimony of John Barcott.)

Q. Where did you get the money to buy the bond? A. I got that cash money.

Q. From where?

A. From my own box and sa—and I got the cash.

Q. Now, then in 1943, you begin to buy more bond. Did you buy more bond at that time?

A. Yes.

Q. What was the inducement when you was buying these bond? [168]

A. Well, it's a—when the Government started to holler for bond, you know, you want to buy a bond, it was in the paper, so I went down there—my boy he was in the service, and it was my duty to do those things, to go get and buy bonds, and I did it.

Q. And where did you get the money to buy the bond? A. I get them from the box.

Q. From the safe deposit box?

A. Safe deposit box.

Q. And did you have any money left in the safe deposit box after you bought your quota of the bond? A. Yes, sir.

Q. Now then you bought some bond in 1945—'44.

A. Yes.

Q. Was that again upon the Government making appeal to purchase war bond?

A. Yes, sir, yes.

Q. And where did you get the money to buy these bond? A. Out of the saving box.

Q. Out of the safe box? A. Yeah.

(Testimony of John Barcott.)

Q. And did you put the profit, or earning that you made from your business, in the safe deposit box——

A. Yeah, I did.

Q. ——right along? [169]

A. I did.

Q. And did you buy these bond when the new issue were out?

A. Well, and about that time, you know, called for, every time they calls, or—I always feel like I want to do it.

Q. And did you then buy some war bond in 1945?

A. Yes, sir.

Q. And do you have any idea the amount of bond that you bought?

A. Well, I can't tell you that, I think—I don't know how much worth, but it was—I can't tell you sure how much I bought in 1945.

Q. All told, how much did you buy between '44, '43, '42, and '45? How much bond did you buy, if you know?

A. I think sixty, seventy thousand dollars, something like that, I don't know.

Q. Do you have—what schooling did you have, if any?

A. I got three year in the school by the old country.

Q. Three years in a school?

A. That's all I was.

Q. Where, in the old country?

A. Yeah, private school.

Q. And are you writing and reading pretty well, or——

A. I read pretty fair.

(Testimony of John Barcott.)

Q. How about writing? [170]

A. My writing fair, nothing extra, but fair.

Q. And do you keep any book of your assets, what you purchase, the date when you purchased these bond, or when you sell them? A. Nah.

Q. Where did you put the bonds?

A. I put the bond in the box.

Q. Where did you buy these bonds?

A. I buy it from the National Bank of Tacoma.

Q. And when you wanted to buy the bond, did you bring the money to the bank—— A. Yes.

Q. ——to purchase them? A. Yes.

Q. Did they give you the bond right away, or did they—— A. No, no.

Q. How did they wait before they give you the bond?

A. Well, sometime three, four, five days, or six, I don't know sure.

Q. You knew at that time that the Government was keeping copy of all your obligation then?

A. I think so, yeah.

Q. Some of your bond were "G" bonds?

A. Yes.

Q. And that was because you couldn't buy any more "E" bond, [171] is that it?

A. Well, that what it is, I think. That—a fellow, he told me, he says, "You better buy G bonds, instead of buy another bond, that's the best."

Q. And the "G" bond are registered in your name, and your interest is sent to you by the Government—— A. Yes.



(Testimony of John Barcott.)

Q. —right along? A. Yes.

Q. You knew at that time, didn't you, Mr. Barcott, that all the bond that you were purchasing would be registered at Washington, the Treasury Department—

A. I said—I think so.

Q. And you knew that your name and address was given to the Government?

A. Absolutely.

Q. Did you purchase these bond with money that you had prior to the time that you purchased them, or did you purchase the bond with the money that you was earning during that period of time?

A. No, I purchased that bond before that—with my money I got before.

Q. You mean—

A. And sometimes money that was made—some money on that time. [172]

Q. And did you have any more money left, after you purchased the bond, in the safe? A. Yes.

Q. And that is true through all of these years, 1943, '44, and '45? Is that true?

A. That's true.

Q. You purchased these bond. Did you make a income tax returns to the Government for these years?

A. Yes.

Q. Did you report your true income. by those years?

A. Yes.

Q. Prior to 1943, who was preparing your income tax reports?

A. And on—'43, you mean?

Q. Before that year.

A. Oh, Tom Ray.

(Testimony of John Barcott.)

Q. Tom Ray. Who was he?

A. He was attorney.

Q. He was a lawyer. Where is he now?

A. He's dead.

Q. And after 1943, who prepared your report?

A. I was prepare them myself.

Q. What do you mean, prepare yourself?

A. I mean, count and figure myself, and then I went down [173] to International Revenue to prepare my income tax.

Q. Internal Revenue.

A. Yeah, Internal Revenue, pardon me.

Q. Not International. He tried to get that for nothing, so— And where did you get the figures, what sources? A. From the books.

Q. From the books. What kind of a book did you keep? It isn't the only book that—

A. That's one of the books here.

The Court: Pass it to the bailiff.

Mr. Gagliardi: Pardon me, your Honor. I still think I am in Superior Court. I forget the rule. I apologize to your Honor for forgetting it.

Q. Now, looking at Defendant—

Mr. Gagliardi: Let's mark it first, so we have— identification A, that will go A-1.

The Clerk: Defendant's Exhibit A-1, for identification.

Q. Is that—will you tell the Court and jury, what is that? What is it?

A. That's my business book.

(Testimony of John Barcott.)

Q. For what year?

A. From 19—July 19—July 19—let's see, I can't see, I [174] will get my glass here. July 1928. Yeah, July 1928.

The Court: To what other date? July 1928 to what other date?

Q. To what other date? What year does that book stop? A. 1943—'43.

Q. '43? A. Yeah.

Q. What date the books starts?

A. This one?

Q. This book, yes. A. 1943. July 28th.

Q. July 28th, 1943. A. Yeah.

Q. That's the date——

A. That's the date on this book, yeah.

The Court: That's when it began.

Q. That's when it began?

A. Began this book, yeah.

The Court: And when does it end?

Q. And when it ends, what date? What's the last date? A. It end February 1946.

Q. February 1946. A. '46.

Q. And do you have another book since 1946?

A. No, sir, not me.

Q. Who has the business since then?

A. My son.

Q. Your son took it over. A. Yeah.

Mr. Gagliardi: Let's see that exhibit now, and——

Q. Prior to July 28, 1943—— A. Uh-huh.

(Testimony of John Barcott.)

Q. ———did you have another book.

A. I gotta the same kind of a book a that one there.

Q. And who had that book?           A. Tom Ray.

Q. Tom Ray. And what did he do with that book, if you know?

A. Well, I can't tell you, you see, he gotta sick, I can't tell you what's a happen on that book.

Q. Did you try to find the book?

A. I tried to find the book.

Q. Now, when did Mr. Ray get sick?

A. Well, I can't tell you sure, that was the Fourth of July, before I started this book there.

Q. And where did he go?

A. He went to hospital.

Q. He went to the hospital. Did he come out of the [176] hospital?

A. He come out of the hospital, I think, around the July, July, because he was went to hospital a little before the July, but I know he come out on July, I don't know what time in July.

Q. Did you ask Mr. Ray to give you the figure in the books up to the date?           A. Yes, yes.

Q. Did he give you the amount which was made during the——           A. First six months?

Q. ———first six months?           A. Yes.

Q. And what did you do with the amount that he give you, how did he——

A. He give me a slip.

(Testimony of John Barcott.)

Q. He give you——

A. He always cared for my books, you know, and do the figuring, and the report such as security and all that stuff, he was doing that.

Q. He was taking care of your book?

A. Taking care of absolutely my business from 1928 to 19—on that time.

Q. And he was fixing what other report, you said Social Security? [177]

A. Social Security, employment, state industry, and all that stuff he was taking care of.

Q. And those are to be made every few months, those reports?

A. Every month, that book goes to him every month, and every three—you know, every month for the state industry to figure how much labor and everything else.

Q. You had to pay industrial insurance?

A. Yes.

Q. Based on the amount of labor that you had?

A. Yes.

Q. You had to pay social security based on the amount of business that you had——

A. He was taking care of everything himself that way.

Q. And unemployment compensation?

A. Yes.

Q. And Mr. Ray was taking care of that?

A. Yeah, at that time.

Q. That's the reason why he had the books?

A. Yeah.

(Testimony of John Barcott.)

Q. And then, did you ask Mr. Ray to give the total amount of income that you had up to July 28th, 1943?

A. No, I asked Mr. Ray to give me total amount of business I take in, 1943, for the six month. [178]

Q. And did he give it to you?

A. He give me that, he bring me one day a piece—a slip of paper.

Q. Well, what did you do with the slip of paper?

A. I keep it over there on my desk.

Q. And then in 1943, did Mr. Ray—or, 1944, what happened to Mr. Ray?

The Court: It is now time for the morning intermission, Mr. Gagliardi. The jury will pass to the jury room with the bailiff.

(Recess.)

Q. Mr. Barcott, before we proceed with the examination of the books, I'll ask you some other questions concerning sources of income that you received during this twenty-six years—twenty-five years. Did your wife receive any money from any sources during the time between 1920 and 1943?

A. Yeah, she got—her mother was—she gotta killed.

Q. Yes, how much did she get for the death of her mother? [179]

A. I think she—the judgment was thirty-seven hundred dollars—she got twenty-seven hundred dollars for it.



(Testimony of John Barcott.)

Q. And the judgment was rendered against the person who caused the death?

A. Yeah. That Kerr, he was in a wreck, her and my daughter and my—her mother, that's the whole business.

Q. Your wife, your mother-in-law, and your daughter, were all in the same wreck?

A. Yeah.

Q. And your wife got twenty-seven hundred dollars?

A. Yeah.

Q. For her injury and for the death of her mother?

A. Yeah.

Q. What did she do with that money?

A. She give it to me.

Q. Where did you put it?

A. I put it in the safe.

Q. Who was the attorney that prosecuted the action?

A. There was a Charlie Dennis, and a Tom Ray.

Q. Tom Ray and Mr. Dennis. Well, Mr. Dennis knew about this income to you. He's the one who paid the money?

A. He should—yeah, he should.

Q. Now, did you purchase any interest in any boat during the year 1920 or 1930? [180]

A. Yeah.

Q. What boat was it?

A. What—the name was "The Ranger."

Q. "The Ranger." A. Yeah.

Q. And what interest did you purchase?

A. I put a five thousand—four or five hundred dollars of cash on it.

(Testimony of John Barcott.)

Q. In the boat? A. Yeah.

Q. Did you derive any profit out of the boat?

A. Well, first couple of years we did.

Q. And—first couple of years you did. Did you derive any profit after those years?

A. Yes, after that too.

Q. How much profit did you derive from the boat?

A. About seven, eight, nine—I can't tell you sure—seven, eight, nine, thousand dollars it was supposed to be.

Q. And what did you do with the money that you got from the boat?

A. I put it in the saving—safe deposit box.

Q. And did you sell your interest in the boat afterwards? A. Yes.

Q. How long did you keep that interest in the boat? [181]

A. That was from 1929 to 1936.

Q. And then did you sell your interest?

A. Yes.

Q. How much did you get from your interest?

A. I gotta thirty-five to thirty-six hundred dollars, I can't tell you sure.

Q. Did you sustain any loss in the selling of your interest, from what it cost you?

A. Well, let's—yes, on that, my part, we lost that.

Q. Now, in 1940, I believe you say you didn't have knowledge of the exact amount of money that you had in that safe deposit box, or bond, is that true? A. Yeah, that's—

(Testimony of John Barcott.)

Q. Did you in 1942—we come to 1942, do you have approximate knowledge how much you must have had in that box?      A. From 1940, it's—

Q. I mean to say the beginning of 1942, did you have any approximate amount which you more or less had in the safe deposit box?

A. I believe it was around more—around more than sixty thousand dollars, I can't tell you sure.

Q. Around more than sixty thousand dollars.

A. Yeah.

Q. You didn't keep an accurate account how much you put in [182] the safe?      A. No.

Q. How do you do? How do you put the money in the safe? How did you put—

A. Well, I say, is that box down there is very—you know, was very big; then, I would keep in the safe.

Q. Yes?      A. Yeah.

Q. How did you put it in the safe deposit box, in small bills or large bills?

A. It's got all kinds—yeah, all kinds of bills, but mostly large ones those days, they was.

Q. Mostly large ones?

A. Large—all kinds—

Q. How did you acquire the large one?

A. Well, through the business, my—

Q. Well, did you acquire in large amount, or did you acquire small amount and then you went out to the bank and got larger amount?

A. No, well let's see, lots of times people come in there and cash me, and fifty dollars bill or hundred dollars bill, or something like that, then I'll save that.

(Testimony of John Barcott.)

Q. And did you purchase any larger amount such as a thousand dollar bill? [183]

A. Yes, that—1945, I did.

Q. Why did you purchase those large amount?

A. Well, it's my brother-in-law come in here in Tacoma, that he wanted build a boat?

Q. Yes?

A. So he says he want around ten to fifteen thousand dollars, and then I went—instead of keep a small bill to carry himself, and I went and buy those one thousand dollars a bill.

Q. You got the small denomination bill and went to the bank and got the larger amount?

A. Yeah.

Q. Where did you buy it? A. What——

Q. Where did you get it, what bank?

A. Well, part of it at Puget Sound Bank, and part of it someplace else.

Q. In the National Bank? How much of these thousands dollar bill did you acquire?

A. About twenty thousand.

Q. About twenty thousand. Where did you get the money to buy those bills?

A. It was from my box.

Q. From your box. At the time you bought the bills, did [184] the bank ask you your name and address, didn't they? Didn't they ask you who you was and your address?

A. No that time, he knows me, I don't think so. They knows me down—you know.

Q. They didn't ask you the name? A. No.

(Testimony of John Barcott.)

Q. And in purchasing this one-thousand-dollar bill, was for the purpose of loaning to your brother-in-law?

A. Brother-in-law to build a boat, yeah.

Q. Were you going to acquire an interest in the boat?      A. Me?

Q. Yeah.

A. I got no idea to acquire an interest——

Q. You had no idea of purchasing an interest?

A. No.

Mr. Pomeroy: Just a second, if the Court please, I'll object, he's leading——

The Court: You are asking leading questions too much, Mr. Gagliardi. This witness is a defendant in the case, and the Court will allow you a reasonable degree of liberality, but you must refrain from leading questions as much as possible. [185]

Q. Now, Mr. Barcott, what become of the book which you had prior to July 1943?

A. Why, I can't get you there, what you say——

Q. What become of the book which you had prior to July, 1943?

A. Well, I told you that it was the book that was on that office over there?

Q. Whose office?      A. Tom Ray.

Q. And what become of Tom Ray?

A. He's dead.

Q. Did you make a diligent effort to get the book?      A. What do you mean, a——

Q. You tried to get the book back, didn't you?

A. Oh yes, absolutely, I tried to.

(Testimony of John Barcott.)

Q. And you couldn't find either Mr. Ray?

A. No, he was already gone, you know, after that.

Q. Then in July, 1943 you started a new book?

A. Yes.

Q. Showing you Defendant Exhibit for identification A-1, I ask you if that is the book that you started in July, 1943?           A. Yes.

Q. And that book shows the income and the expenses of your business? [186]           A. Yes.

Q. What language is it written in?

A. It's part of Slavonian there.

Q. Will you explain to the Court and the jury what you mean by these word in the beginning of each page, where you say "Ri" and then "L-i-s-t-o." What do they represent?           A. You mean——

Q. "Ri," what that represent?

A. Ri, that mean gross, gross.

Q. You mean receipts?           A. Receipts, yeah.

Q. From what sources? What source did you have this receipt?

A. Receipts, what sources, from, yeah——

Q. Where did you get it?

A. From the cash.

Q. From the cash from where?

A. From the register.

Q. And where was the register?

A. Register was in the front, in the Oyster House.

Q. You mean——



(Testimony of John Barcott.)

Mr. Gagliardi: Your Honor, I don't want to lead the witness, but you see, Your Honor, it is quite hard for him to speak the English language and understand my question. Sometime——

The Court: Proceed.

Q. Now what business was it, what is the name of the business you got?

A. California Oyster House.

Q. Huh? A. California Oyster House.

Q. And this was the receipt from your business? A. Yes sir.

Q. Now, what is meaning of the word L-i-s-t-o?

A. You mean the first, first those things? Come on, give me the—help me out. I can't tell what it is when you spell it.

Q. What part of the book is the income reported, the gross income?

A. You mean gross business——

Q. Yeah. Gross business done, yeah.

A. That's the part I call "Ri," that's the one where how much we take the cash in.

Q. Cash in, all right. Now, what's the other side? A. How much we pay out.

Q. And paid out for what? [188]

A. For grocery, butchers, and everything else, what we supposed to pay, you know—come in.

Q. And what they represent at the bottom of each page? A. Here? Labor.

Q. Labor. Do you have the name of the employee that you have in the restaurant?

A. That's the labor here, yeah, that's each line here.

(Testimony of John Barcott.)

Q. Does that represent the amount paid to each?  
Each employee? A. Yes, sir.

Q. Is the receipt in each case marked in the same way? A. Yes.

Q. The income and the expenses?

A. Yes, sir.

Q. What expenses represent on the place where you have listed as L-i-s-t-o, as Listo?

A. I mean gross.

Q. Gross what? A. Business I take in.

Q. And what you call the expenses, what is the word in the book that is called—refers to——

A. Expenses is the second one.

Q. The second one. That's at the top of the page.

A. Yeah, that's what I told you, I says the butcher and the [189] grocery men, part of it, and the milkman and a couple other.

Q. Does that represent all of the expenses that you had in the restaurant?

A. No, I got something else besides, some little books there was.

Q. Well, what other expenses did you have?

A. Huh?

Q. What other expenses——

A. I gotta gas, lights, and stuff like that, monthly. No daily.

Q. Rent? A. Rent.

Q. How did you pay those expenses?

A. I pay by the check.

Q. And where did you draw the checks? What bank?

A. From National Bank of Washington.

(Testimony of John Barcott.)

Q. And what did you put—where did you get the money to put in the bank to pay for those checks? A. I get it from the business, cash.

Q. And how much money did you put in the bank each month? For what purpose did you put it in?

A. Well, to pay the part of the butcher, part of the catsup, and stuff like that. [190]

Q. You mean those bills that you pay by checks?

A. Yeah.

Q. And you say you have another little book that represents what you paid by checks?

A. By check or cash, such as dishes, and stuff like that; some of the catsup sent from Seattle, and part of the laundry, something like that, you know.

Q. Laundry—you mean those bills which you ordinarily pay monthly?

A. Monthly, yeah.

Q. And those which are marked there, how were they paid, by check or cash?

A. This one here?

Q. Yes.

A. The butcher paid by check.

Q. The butcher, but I mean those which are marked here in the book, in the book which you have now in your possession, which is marked Exhibit A-1 for identification.

A. Uh-huh.

Q. What expenses do they represent? Do they represent checks or cash?

A. They represent—see, there's a butcher come in with a slip of fifty dollars the butcher today

(Testimony of John Barcott.)

there, then all [191] week, then after the week I put right here every day how much which have come in, bring it down.

The Court: What account was that? Did you pay the butcher in cash or did you pay him by check?

The Witness: Oh, I pay the butcher by the check.

Q. All of the expenses marked here on your—on that book paid by checks?

A. On this one here?

Q. Yes.

A. No, by the check, that's the thing—that's the everything I know, I no pay by the check, I pay by the cash.

Q. That's the thing that I am trying to get.

A. Well, well, that's it.

Q. In that book then, is marked all of the bills that you paid by cash? A. Cash.

Q. And in the other little book then, is what you paid by check? A. Check, yeah.

Q. Mr. Barcott, is there any expenses charged there in that book which was paid by check, in the book which you have in your hands, which is Exhibit A-1? [192]

A. I explained it, yeah, the butcher, I told you that——

Q. The butcher. A. Yeah.

Q. I see.

A. The butcher and some of the fishermen there was paid by the check, too.

(Testimony of John Barcott.)

The Clerk: Defendant's Exhibit A-2 for identification.

Q. And where did you mark the payment of the checks? Did you mark it in any other book what you paid by checks?

A. Yes, that one there.

Q. Showing you Defendant Exhibit A-2 for identification, is that the book that represent payment of bills by check?

A. By the check, by the monthly, yeah.

Q. By the month. A. Yeah.

Q. Did you have any other book in your business? A. No.

Q. That's the total amount of your books?

A. Yeah, that's all.

Q. Did you put down all of the money that you received out of your business in this Exhibit A-1 for identification? A. Put down what? [193]

Q. The amount which you received every day, that you got out of the business.

A. Yes, sure.

Q. And did you mark all of the expenses that you received in Exhibit A-1 as well as Exhibit A-2 for identification? A. Yes.

Q. The two together represent all the expenses that you sustained? A. Yes.

Q. Did you receive any greater amount than what is marked in the book A-1 for identification?

A. Well, let's see, for——

Q. Any more than what you marked there?

A. No, no sir.

(Testimony of John Barcott.)

Mr. Gagliardi: We offer the two identifications.

Mr. Pomeroy: No objections.

(Whereupon the books referred to were admitted in evidence as Defendant's Exhibits Nos. A-1 and A-2, respectively.)

Q. Now, Mr. Barcott—

The Court: I suppose, Mr. Gagliardi, when you ask him the question whether he received any more income than that, you meant from the business?

Mr. Gagliardi: From that business, your Honor, I want to limit it to that business alone.

Q. Now, did you receive—you had a contract with somebody—

Mr. Gagliardi: May I have that exhibit? I think—I don't recall the number of the exhibit. It is the contract between himself and his son.

Q. Mr. Barcott, you say you had two sons?

A. Yeah.

Q. What's their name?

A. John and Anton.

Q. John and Anton. Did—is there any of them married?      A. The both are now married.

Q. Anton, when did Anton get married?

A. 1932, or '31—'32, I think, something like that.

Q. And at the time that he got married, did you buy any home for him?

A. After that, yeah, after while, I buy him a home.



(Testimony of John Barcott.)

Q. And when did you buy the home?

A. In 1933 or '34, I don't—can't tell you sure what year.

Q. Showing you Exhibit No. 9, Government Exhibit No. 9, I ask you if that is the contract that you made with your [195] son, or at least an extract of the contract that you made with your son when you bought the house for him?

A. I don't know—I no understood anything about a contract business or anything that Tom Ray was preparing. I can't tell you sure, but I think it is, I don't know sure.

Q. All right. And who prepared the contract?

A. Tom Ray.

Q. Why did you make the contract with your son? Did you buy a home for him?

A. Well, I buy a home, and the contract—I want to make him payments in advance. He spend the money, he throw away money so foolishly.

Q. You say he throw the money foolishly?

A. So I make the—made him pay the payments on it.

Q. And where did he make the payments?

A. Oh, it was down the National—Washington bank.

Q. Do you know that the contract called for the payment of interest?

A. I don't know anything about it. Tom Ray was to take care of it—I no used—I never bothered with that—

(Testimony of John Barcott.)

Q. Did you intend to charge your son any interest on that contract? A. No sir. [196]

Q. And did you ever go to the bank and find it out, whether or not——

A. No, I never touched that. I never even looked at it.

Q. You didn't even look at the money?

A. No, sir, I never looked at the thing at all.

Q. Did he make the payment right along on the contract?

A. I think so, I never keep track of it.

Q. And what—when is first time that you touched the money? When was the first time that you touched it, you did take it?

A. That was about two or three months ago, a couple of months ago.

Q. What did you do with it?

A. I draw the four thousand dollars on that savings account and I put it back to his business.

Q. You gave it to your son to his business?

A. Absolutely.

Q. Who took over your business?

A. Anton Barcott.

Q. When did he take over the business?

A. I would think 1946, in February.

Q. And what did he do with the money that you took out of the bank?

A. He run my own place, pay the bills in the place and remodel, and do what he is supposed to do. [197]

(Testimony of John Barcott.)

Q. Did you have any idea at all that you were going to collect interest from your son?

A. No sir, I never even think of it.

Q. Did you receive some dividends from the Fishermen's Packing Company? A. Yes.

Q. What dividend did you receive, do you recall? Did you receive any check from the profits of those dividend?

A. They sent a check to me, yeah.

Q. Did you give this figure to the person who made the income tax return for you?

A. Yes.

Mr. Gagliardi: May we look at those reports, please, the exhibit—the income tax return.

Q. Showing you Government Exhibit No. 1, which is reported to be a photostatic copy of the income tax return that you made for the year 1943, I would like to call your direct attention to item number two which say "dividends," and I ask if those are the dividends that you received from this packing house?

A. Yeah, that's what it is.

Q. Did you have any other source of income that would pay dividend? Did you have any other interest in any corporation that paid you dividends?

A. No corporation.

Q. And there is another line which says, number three, line number three, says "Interest received." Look at the amount of interest, number three, look at the report, Exhibit No. 1, number three say "Interest received." What's the amount of interest that you received there?

(Testimony of John Barcott.)

A. I can't tell you, I can't see with my glasses, you know.

Q. May I have it back?

A. Yeah. I can't read that thing.

Q. Item number three reads: "Interest on corporation bonds, bank deposits, notes, and other—and so forth, \$184.00." Where did you receive this interest from? Who paid you the interest? What sources?

A. On—interest in the bank, the bank.

Q. Interest from the bank? A. Yeah.

Q. Did you receive any interest on the Government bonds? A. Yes, that's right.

Q. And did you put it in the return when you made your income tax return? A. Yes.

Q. Now we come to 1944, Exhibit No. 2, Government Exhibit No. 2, in which item number three—you say you can't [199] read this fine print?

A. No, I can't do it.

Mr. Gagliardi: May I be permitted to read it, your Honor?

Q. Item number three says this: "Enter here the total amount of your dividends and interest, including interest from Government bond obligations, unless wholly exempt from taxation." You entered the total amount of \$698.50. Was that the amount that you received for that year?

A. Yes.

Q. Is that the amount you gave to the girl who was making your income tax return?

A. Yes.

(Testimony of John Barcott.)

Q. Did you receive any greater amount than that to your knowledge?

A. Not that I know.

Q. Now come to Government—Plaintiff's Exhibit No. 3, which is the return of income tax for the year 1945. Item number three says this: "Enter here total amount of your dividends and interest, including interest from Government obligations, unless wholly exempt from taxation." You entered there fourteen hundred dollars.

A. That's right. [200]

Q. And what did that represent, what interest?

A. Dividends and interest from the bonds.

Q. Dividend and interest on the bond.

A. Yeah.

Q. Did you receive any more than that?

A. Not that I know.

Q. That is the maximum amount that you received?

A. Yeah, that's what it was supposed to be.

Mr. Gagliardi: Give me that exhibit termed the contract. Is the contract there? No, some other contract, with the Fishermen Corporation. May I look at the exhibit, your Honor? I just want to look at the exhibit.

Q. Did you purchase any interest in the Fishermen—Fishers Packing Corporation? You testified that you purchased, you got some dividend from that corporation.

A. Yes.

Q. How many shares did you purchase?

A. That was, I think, fourteen hundred shares there was in the Fishermen's Packing Company.

(Testimony of John Barcott.)

Q. You mean fourteen shares or fourteen hundred dollars?

A. Fourteen hundred dollars, yeah, that's right.

Q. How much you pay on it? How much you pay for them?

A. A hundred dollars a share. [201]

Q. Hundred dollars a share. And how many shares did you receive?

A. That was fourteen hundred shares there was after it was settled with the company.

Q. Did you have agreed to purchase more than fourteen hundred shares?

A. Yes, before it was more.

Q. How much did you agree to purchase?

A. That was around eighteen—eighteen shares.

Q. And that was at the time when the corporation was formed?

A. Corporation was started, yeah, well the time, between the time when it was started, yeah.

Q. And how was the money to be paid?

A. Pay out of the profit of the corporation.

Q. That was the agreement you had with the corporation?

A. Yes, but I paid—I paid cash on the start, I put some money on that.

Q. And then what become of the other four shares?

A. Four shares, the company was, you know, they no made any money and we made a settlement for the amount. I was owe some money to the company.



(Testimony of John Barcott.)

Q. Yeah.

A. And we made a settlement with the manger that cleared up all that thing and make the fourteen hundred share the [202] full amount what's it worth.

Q. You mean fourteen shares.

A. Fourteen shares, yeah, fourteen, that's right, pardon me.

Q. And there was an agreement between you and the corporation?      A. Yes.

Q. Did you sell the shares prior to January 1, 1946, or do you still have it?

A. This year, yeah.

Q. Fourteen share.

A. Yeah, I sell it. Sold some shares.

Q. This year? I mean, before the first of January, 1946.

A. That was last—sometime last year. I don't know——

Q. All right, last year.      A. Yeah.

Q. During 1945 you had——

A. Yeah, something, I don't know, I——

Q. Now, have you accounted for all the sources, all the money that you received from the California Oyster House, and the interest that you received?

A. Yes.

Q. Now, do you recall sometime in February 1946—or, January 1946, receiving a telephone call from some [203] sources?      A. Yes.

Q. What did you learn when you went back to the restaurant, California Oyster House.

A. They left a telephone number there.

**(Testimony of John Barcott.)**

Q. Telephone number? A. Yeah.

Q. And did you call that number?

A. Yes.

Q. And who answered the 'phone? Did they tell you who it was?

A. They told me it was somebody by the name of Mr. Swanson and Nielsen, he says they wanted to see something about the revenues.

Q. About Internal Revenue? A. Yeah.

Q. And where did they tell you to go?

A. He told me, he says, "You're supposed to come here on seventeenth building." He didn't say seventeenth building; he said seventeenth floor.

Q. On what floor?

A. Seventeenth floor in Puget Sound Bank Building.

Q. The seventeenth floor of Puget Sound Bank Building. A. Yes. [204]

Q. And did you go there? A. Yes.

Q. Did you go there right away, or did you wait any length of time?

A. No, I went right away after he called me up.

Q. And did you—where did you go? Where?

A. In the Puget Sound Bank Building.

Q. On the seventeenth floor? A. Yes.

Q. Who did you find there?

A. I find there Mr. Nielsen and Mr. Swanson.

Q. And what were they doing, standing up or sitting down?

A. Both, they stayed there.

(Testimony of John Barcott.)

Q. And what did Mr. Swanson do?

A. Mr. Swanson was—he was ready to go out.

Q. And what did he do?

A. And Mr. Nielsen told me, he says, “Sit down, John, sit down,” he says, and Mr. Swanson went out.

Q. And then what did Mr. Nielsen say to you?

A. Mr. Nielsen says to me, he says, “What are you doing with those thousand dollars of bills?”

Q. And what did you say to him?

A. I says, “I got ’em.”

Q. And what else did he say? [205]

A. He says, “Where’s that thousand dollars bill?” I said, “Down in the box.”

Q. And what else did he say? Did he say what you do with bills, did he?

A. He says, “How about we can, do want to bring that money here or you gonna go down there see that?” I says, I says, “All right, we can go down there to see.” And I got my working clothes on and I figure out in my pocket and I says, “I got no key.”

Q. You didn’t have the key.

A. Yeah.

Q. All right.

A. I says, “All right, I’ll go ahead and get the key and I wait down there in the bank for you,” I says, I mean we gonna go down in the box.

Q. All right, what did you do then?

A. And then I come down—get out from the building, I think of it——

(Testimony of John Barcott.)

Q. Where did you go?

A. I went to Oyster House.

Q. Yes? A. Yeah, and I——

Q. For what purpose did you go there?

A. My purpose was to get the key. [206]

Q. All right.

A. But I think when I get out that my money is in the Oyster House.

Q. You think that your money was in the Oyster House?

A. Yeah, that one thousand dollars bill.

Q. And where were they?

A. They was in the safe in the Oyster House.

Q. In the safe in your Oyster House?

A. Yeah.

Q. And what did you do then?

A. Then I take it. It was in—an envelope, and I take it and put it in my pocket.

Q. And did you get the key for the safe deposit box? A. Yes.

Q. And what did you do when you got the—did you go back?

A. I went back down to the bank.

Q. And what did you do when you went down to the bank?

A. I was waiting for him and pretty soon he come in.

Q. Who come in? A. Mr. Nielsen.

Q. And where did you two go to?

A. I went down to the bank and signed my name, and went opened up the box, but before we went down there, Mr. Nielsen, he says to me, he

(Testimony of John Barcott.)

says, "John," he says, [207] "You don't have to go to the box." I told him, I says, "Never mind, we can go, that's all right."

Q. He says, "You don't have to go to——"

A. Yeah.

Q. "——unless you want to." A. Yeah.

Q. Did he say, "You don't have to show to me anything"?

A. Well, that's what he, you know, he say it that way.

Q. And what did you say to him?

A. I says, "Never mind," I says, "All right, I gonna show you," I says, "everything I got."

Q. All right. Did you go to the box?

A. Yes.

Q. And did you open the box? A. Yes.

Q. What did you take out of the box? What—  
did you take the little box out of the safe?

A. Out of the National Bank safe and I went down in the little room.

Q. And did they have a little room, in those places? A. Yes, yes.

Q. And who was in the little room?

A. There was myself first, and then Mr. Nielsen come in [208] right close to me, see.

Q. And what did you say to Mr. Nielsen, what did you do?

A. I says, "Here's your—," I says, "Here's your box, here's your—" then I pull out my twenty thousand dollars in my pocket and I even look. I says, "Here's your one-thousand-dollars bill."

(Testimony of John Barcott.)

Q. And where did you put it?

A. I put it right in that box.

Q. And what did Mr. Nielsen say, if anything?

A. He don't say anything.

Q. Now then, did he count what was in the box?

A. Then after a while he said, "Now," and he started to count that money.

Q. And how much money did you have?

A. I got twenty thousand dollars.

Q. Did you tell Mr. Nielsen that you had only ten thousand dollars?

A. I was a—I was a telling him that ten thousand, but I says I might as well show him all the whole darn thing I got.

Q. And did you have twenty thousand?

A. Yeah, I got twenty thousand.

Q. And you knew that you brought twenty thousand when you went? [209]

A. Yes sir, I know.

Q. And you had the twenty thousand dollars in your own safe in the restaurant?

A. Yes sir.

Q. You got it out of the safe?

A. Yes sir.

Q. And you went down to the safe deposit box with Mr. Nielsen then?

A. Yeah.

Q. And that's the twenty thousand that you showed to him?

A. Yeah.

Q. And did he count it?

A. Yeah, he sat down there and he started to count it.

Q. Well, did—did he tell you that there was twenty thousand instead of ten?

A. Huh?



(Testimony of John Barcott.)

Q. Did he tell you that there were twenty thousand instead of——

A. No, he told me the twenty thousand when he counted it, you know.

Q. And what did you say?

A. I says, "All right, that's fine," I says.

Q. What else did you say? Did you know there were twenty thousand? [210]

A. Yeah, I know there was the twenty thousand dollars there.

Q. And did you offer to pay Mr. Nielsen some money to make a favorable report?

A. No sir, I never did no such——

Q. Did you know what a favorable report mean?

A. I didn't know anything about it, a report or anything.

Q. What did you say to him concerning the thousands of dollars?

A. I say, "Here's your one-thousand-dollars bills you was looking for." I showed him that box and that's what I told him.

Q. And did you then offer to buy his wife a fur coat and——

A. I never tell him anything, no sir.

Q. Did you know Mr. Nielsen?

A. I didn't know him; first time I see him that time.

Q. Did you know whether or not he was married?

A. I don't know he was a married or single, I don't know anything about him.

(Testimony of John Barcott.)

Q. And did you offer to buy his wife a fur coat and him a suit of clothes, if he make a favorable report? A. I never offered him nothing.

Q. Now, after he counted the money, did he put it back into the safe?

A. Yeah, I put it back in the same in the box.

Q. And——

A. He count the money, he count the bonds, and everything in it.

Q. Did you have any other cash in the safe deposit box?

A. There was three thousand dollars of small bills.

Q. And then what did you do after your—counted the money, did you put the box back into its place?

A. Well, he count the bonds too, you know. He was there for a while, there he count the bond, and I got my son-in-law bonds there, and I got my lodge, my Slavonian-American Lodge bond, he check up all those things.

Q. You had your son-in-law's bond and——

A. Bond, and Slavonian-American Benevolent Society bond was there, there was one of my friend's bond there, he counts all those in there.

Q. Did you have any bonds which you had purchased in 1936? A. Huh?

Q. Did you have any bonds in there which were purchased either in 1936 or '37? Baby bonds. Government bonds.

A. Oh '37, yeah, they was there.

(Testimony of John Barcott.)

Q. Where were those bonds?

A. They was there in that box?

Q. And he counted it all? [212]

A. Yeah, he counted all them that——

Q. And then what did you do?

A. Well we,—when he finished the count—it took him quite a little bit of time, and then when he finished the count we went out.

Q. And where did you put—do with the box?

A. I simply closed the box, put them in box, put them back where they belong.

Q. And where did you go?

A. Then I went down there in my place.

Q. When did you next hear from either Mr. Swanson or Mr. Nielsen?

A. The next time.

Q. When was the next time?

A. When I see 'em, I don't know, I think four, five, six days, or later, or ten, I can't tell you sure, the date.

Q. And they came over to see you, or telephoned you? A. They called me up on the 'phone.

Q. And what did they say to you?

A. Now, he says, "We want you to do down the box, we want to check your box again."

Q. Where did they tell you to go?

A. Down to the Washington Bank.

Q. All right, what did you do? [213]

A. I went down there.

(Testimony of John Barcott.)

Q. Did you go to their office first, or did you go right to the bank?

A. No, I—direct to the bank. They was waiting for me in the bank, both of them.

Q. Both of them. And did you go down to the box again? A. Yes.

Q. Did they say anything to you concerning you don't have to show them the box?

A. Never said a word.

Q. Didn't say a word then. And did you go back to the box?

A. What do you mean?

Q. In the safe deposit box.

A. Yes, the same thing, we do the same thing. They was there, both of them, and we went same that room, and they sit down and they check up again.

Q. And did you at any time endeavor to conceal anything from them?

A. What——

Q. To hide anything away from them?

A. No, absolutely no, everything I got I just a show them right there. I never think that I do anything wrong.

Q. You knew that they were going to accuse you of not [214] paying income tax at that time?

A. No sir, I was sure that I was absolutely honest and everything. I paid the full amount and everything.

Q. And did they ever say anything concerning you about income tax?

A. They never mentioned anything to me.

(Testimony of John Barcott.)

Q. The only thing they mentioned was money?

A. Money, well there was—yeah.

Q. Did you then voluntarily, or otherwise, did they ask you if you had any other box?

A. Yes, afterward, yeah.

Q. And what did you say to them?

A. I says, “Yes, I got a Washington—” I mean, “Washington Building.”

Q. In the Washington Building?

A. Yeah.

Q. Did you give the number of the box?

A. No, he come in with me.

Q. And what did they say, they want to see this other box?

A. Yes. Both come in with me.

Q. What did you have in this box?

A. I got bunch of insurance, and paper, all kinds of paper.

Q. You mean house abstract—

A. Well, insurance paper, somebody else paper, and all [215] kinds of stuff there.

Q. And how long did you have that box in the Washington Building?

A. Oh, maybe three, four, five year, I think.

Q. And how long you have the box in the National Bank of Washington?      A. Since 1922.

Q. Since 1922. And what did you keep in the box in the National Bank of Washington?

A. I keep the money, bond, everything was there.

(Testimony of John Barcott.)

Q. And where did you keep your insurance and your abstract and your deed?

A. In that box over there, yeah, down below.

Q. Why did you keep two separate box? Why?

A. Well it's,—well, I can't help it, I got so many things there. I got plenty of that stuff there and I can't keep it in the one box.

Q. You mean, they would not go in, in the National Bank of Washington?

A. Well, after while there was a big one, but before—you know, there was a kind of a size box, but they can't go in there. There was a bunch of us was keeping, before I bothered, down there downstairs there in the Washington Building, in that box, we was keep a bunch of insurance [216] in my place.

Q. And——

A. You see you know why I was a scared because we got a fire once in 1938 there too, you know.

Q. You mean you was scared your insurance would burn up.

A. Yeah.

The Court: It is now twelve o'clock, Mr. Gagliardi. We will take an intermission until two o'clock this afternoon.

(Recess.) [217]

2:00 o'Clock P.M.

The Court: Now if there is nothing further, we will proceed with the case we have. You may proceed, Mr. Gagliardi.



(Testimony of John Barcott.)

Mr. Gagliardi: If the Court please, Your Honor, the defendant has an additional instruction and request the Court to give to the jury.

### JOHN E. BARCOTT

resumed the stand for further examination, and was examined and testified as follows:

#### Direct Examination

By Mr. Gagliardi:

Q. Mr. Barcott, I believe we left this morning concerning the safe deposit box that you have in the Washington Building. Do you recall when did you rent that box?

A. Oh, about four or five years ago.

Q. And what was the purpose, or what was the occasion of renting that box?

A. Well, I got a bunch of policies, and paper, paper lease and stuff like that.

Q. And was there any space to—in the box in the Washington [218] Building to put it in—I mean the National Bank of Washington safe deposit box. Was there any space to put them in there at that time?

A. What do you mean, I can't get you there.

Q. You had another box in the National Bank of Washington? A. Yes.

Q. How long did you have that box?

A. Since 1920—'22.

(Testimony of John E. Barcott.)

Q. Is it the same box you got now, or was there a larger or smaller box—

A. Large one. Large one now.

Q. It's larger now?           A. Larger now.

Q. And was it smaller before?

A. Before, yeah.

Q. Now, when you rented this box from the Washington Building, what did you put in, and what did you hold in there up to this time?

A. Well, I told you. I told you a while ago, I says all them insurance policy, business policy, and—well, the insurance business policy and papers, we had all kinds of papers there.

Q. Did you hold any paper belonging to anybody else?

A. Yeah, some of it belonged to Slavonian-American Benevolent [219] Society there, and all that kind of a stuff.

Q. And what position do you hold in that society?

A. I was the Treasurer there in that.

Q. And did you have the will of any other people?

A. Yeah, I got will of some other lady next door to us.

Q. Did you keep any money or bond in this box in the—           A. No sir.

Q. Where did you keep them?

A. I keep it down in the Washington National Bank.

(Testimony of John E. Barcott.)

Q. Now there is here introduced in evidence—showing you Plaintiff Exhibit No. 10, and I ask you if you recognize what those two slips are?

A. Yeah.

Q. What are they?

A. That's for the box in the Washington Building.

Q. There are two of them on that exhibit; one is what date?

A. One is—let's see, one is, it's nothing to me—ten, I don't know, I can't read very—

Q. After you left the National Bank of Washington on January 28, 1946, that is the date when you had first conversation with Mr. Nielsen, did you go to the safe deposit box in the Washington Building? A. I did.

Q. What was the purpose of your going there?

A. I got a couple of policies with me in my pocket, and I went over there, on the way I put it into it.

Q. And at the time you went in, you signed a slip you were going in? A. Yes.

Q. And those safe deposit box were in your name? A. Yes.

Q. And this Exhibit No. 10 bears your signature? A. Yes.

Q. How often would you go to this box?

A. Oh, no very often, I don't know, sometime it take a long time to go over there. I've got nothing very much to do in that box.

(Testimony of John E. Barcott.)

Q. And you knew that every time you went in you had to sign a slip? A. Yes.

Q. And you knew also that every time you went in they marked the time in which you was in?

A. Oh, I don't know, I think it the truth though.

Q. And the same was true with the National Bank of Washington? A. Yes.

Q. Did you go there again after January 28?

A. What box?

Q. In the Washington Safe Deposit box, which is in the [221] Washington Building?

A. Well, I think so, I don't know sure, but I think so I did.

Q. Did you keep record whenever you went into those box and whenever you went out?

A. No.

Q. Did you go to the box when you had to go there, you didn't keep any date? A. No.

Q. Now, the next time you went to that box that was with Mr. Neilsen and Mr. Swanson?

A. Yeah, that was while—yeah.

Q. That was February 13th?

A. I think so.

Q. And at that time did you open the box for them? A. Yes.

Q. Who told them that you had this other box?

A. I did.

Q. And did you go to that box and you opened the box? A. Yes.

(Testimony of John E. Barcott.)

Q. Was the box contain the same contents it always contain?

A. That's the same thing, same like it was before, all the time.

Q. Did you take anything out of it between those two dates? [222]

A. No sir.

Q. Did you at any time keep any money or bond in that box?

A. No sir.

Q. Where did you keep all your money and bond?

A. I keep it down in the Washington Bank.

Q. When you purchased—hired this box in the Washington Building, was the National Bank of Washington box large enough to contain all your stuff in there?

The Court: I think that is repetition, Mr. Gagliardi.

Mr. Gagliardi: Oh, I beg your pardon, your Honor.

The Court: Proceed.

Q. Did you at any time, either before or after you talked to Mr. Nielsen, take anything out of the safe deposit box in the Washington Building? Any money or bonds? Did you have any there?

A. No, no, no, I got no anything that way there.

Q. Now——

Mr. Gagliardi: Will you give me the other exhibit, those deeds, will you? The deeds, the photo-static copy of the deeds. [223]

(Testimony of John E. Barcott.)

Q. Plaintiff Exhibit No. 16 is a photostatic copy of a deed given to you by H. J. Gielens in November 30, 1943. Did you purchase that property?

A. I bought the property for a fella, you know, he was ready to get kicked out of a house, and he come—he lives close to me over there.

Q. Yes.

A. And he come in to me and he says, “John,” he says, “I gonna have to get out from the house.” He’s got a sick wife.

Q. Yes.

A. She was pretty sick woman, and he says, “I have to get out if you can’t help me out on a little money, some money to buy that property.” He says, “those people they want to sell that.” I says, “Bob,” I says, “all right,” I says, “I do it.”

Q. And how much money did you give him?

A. About seven hundred fifty dollars.

Q. And was you buying the property for yourself, or it was for Mr. Gielen?

A. No, I was buying it for him, you know.

Q. And then Government Exhibit No. 17 is a deed from you to Robert B. Knego.

A. Knego, yeah, that’s—— [224].

Q. Who is Knego?

A. He’s one of my neighbors, a couple of blocks from me.

Q. A couple of blocks to you.                    A. Yeah.

Q. Was he the man who you lend the money to?

A. Yeah, that’s the man I pay for.



(Testimony of John E. Barcott.)

Q. Was he purchasing the property from Gielens?

A. Yeah, he made—he went down there and fix it up, I give him money, he put the mortgage on me.

Q. He put a mortgage in your name?

A. Yeah.

Q. And did you at any time consider that property was yours?

A. I never—you know, I used to call on there to pay me out.

Q. And Government Exhibit No. 17 is a deed from Knego, from you to Knego and his wife?

A. Yeah.

Q. Is that the deed you gave back to Mr. Knego for the property that your purchased?

A. Yeah.

Q. Did you recall anything about it when you was talking to the agent that you had a title to this property?

A. No, I never pay any attention to 'em, you know. I never [225] really never got anything out of those things.

Q. It was merely loaning so far as you was concerned?

A. I would loan till he pay me. He pay me in a short time, too, you know. He was pay me off so much in a short time. He was working for Government through the war time.

Q. Now——

(Testimony of John E. Barcott.)

Mr. Gagliardi: Give me Exhibit No. 1 of the Defendant, I put——

Q. Showing you Government — Plaintiff — Defendant Exhibit A-1, and that is the book that you kept for the income and expenditure of your business, the California Oyster House.

A. Yes, sir.

Q. Did you give that book to Mr. Swanson to audit it?      A. Yes.

Q. Did he have it in his possession all the time?

A. Yes.

Q. And did you give also the little book which is marked Exhibit No. 2?

A. There was no first time that I give you that book on that one there. After while, I think, I don't know when it was.

Q. Did you give it to him after while? [226]

A. Yeah, I thinks it was, I give it to him, I give it to my attorney, you know, he was take care of all the time.

Q. Who was your attorney?

A. Anthony Ursich.

Q. Anthony Ursich. And did you at any time try to conceal anything from the Government agent?

A. No, sir.

Q. Now, Mr. Barcott, during the time that your wife was working in the restaurant, did you know that she was receiving tips from the customers, and making money?      A. I don't know.

Q. Did you make any report for that money?

A. No.

(Testimony of John E. Barcott.)

Q. Why?

A. I didn't—we didn't know that we was supposed to pay the income on that tip.

Q. There was no one ever suggested?

A. Yeah, we was figure that the gift.

Q. That's a gift?           A. Yeah.

Q. And you never reported those as income tax return?           A. No.

Q. And did any time, any of the agent of the Government, when you went to the Government to make the return for [227] your income tax, suggested that tips was income that should be reported?

A. Never mention nobody to me, nothing.

Q. Did your attorney, Mr. Ray, at any time, think——

A. Never, I never hear of such a thing, no.

Q. Did Mr. Ray know at that time that your wife was working in the restaurant getting tips?

A. He knows.

Q. Did he ever suggest it to you that you should include it in your income tax?

A. Never, never.

Q. And did you sincerely and honestly believe that was not reportable as income?

A. Absolutely. I never—I never heard of such a thing——

Q. Did you believe it was not taxable income?

A. That's what I be—that's what I understand.

Q. If you understand otherwise, would you have reported it?           A. Yes, sir.

Mr. Gagliardi: You may cross-examine. [228]

(Testimony of John E. Barcott.)

Cross-Examination

By Mr. Pomeroy:

Q. Mr. Barcott, how long were you treasurer for the Yugo-Slav—Slavonian Benevolent Association?

A. About twenty years.

Q. Did you keep the books of that organization?

A. No, I no keep the books.

Q. What were—what were your duties as treasurer?

A. Treasurer, to put money in the bank and to keep the file. I got a box, they save it, and they give me file all that deal that we got in the Slavonia, all of it.

Q. And you—and you kept account of what money you had from the Slavonian Benevolent Association? A. Yes.

Q. You never had any trouble over that account, did you? A. What do you mean?

Q. Well, you were never questioned by the Slavonian Benevolent Association about your keeping the books for them, were you?

A. No, they got a bookkeeper, they got a regular secretary to keep the books.

Q. Uh-hum, but you kept the money?

A. The secretary deliver the money to my restaurant down [229] there, then I put 'em in the bank, that's all I had to do it.

Q. And you kept track of what money you had for them all the time, didn't you?

(Testimony of John E. Barcott.)

A. No, our secretary—we got a different system. Our secretary report all that money we got on that lodge there. I got nothing to do with those things except to put the money in the bank.

Q. Except that you had to give it back to them when they wanted it.

A. Well, the secretary sign the check, and I had to sign the check too, myself. And nothing go without check.

Q. When was the last time that you had any of their money?

A. Oh, about a couple of months ago.

Q. Was there any of the money that was in this box that was looked at——

A. No, none in the box, no.

Q. Where did you keep that money?

A. I keep the money in my place.

Q. In the safe?           A. In the safe.

Q. And all the money that you kept in your place in the safe, belonged to the Slavonian Benevolent Society, is that right? [230]

A. No, he come in once a month.

Q. Once a month.

A. Once a month a little money today, and tomorrow I putta there in the bank.

Q. How much—how much money do you have for them——

A. Oh, they no run a very high. They run about—ah, it would reach a couple a hundred dollars a month.

(Testimony of John E. Barcott.)

Q. During the war you had various drives, didn't you, to raise money for Slavonian War Benefits for Yugoslavia? A. Who me?

Q. Well, the Slavonian Benefit Society—Association.

A. Ah, that's got nothing to do with that. This is a separate local, down in Old Tacoma.

Q. Down in Old Tacoma.

A. That used to be a branch there.

Q. Did you ever donate any money from your own funds to the War Relief for Yugoslavia during the war?

A. Let's see, I don't know, I think so.

Q. You think you did?

A. I think so, I donate a hundred dollars or something like that, I don't know, I can't tell you——

Q. When did you do that?

A. That was in Seattle outfit over there. That's all relief to the—— [231]

Q. Yeah, how many times did you donate to that cause? A. I can't tell you.

Q. How much money did you give to the Yugoslav War Relief?

A. I can't tell you. There's a fellow who was supposed to—to care of it, he says it was not taxable, any money to give it to them.

Q. How much money did you give to them?

A. It was no very much, I don't know how much, but it was no very much.



(Testimony of John E. Barcott.)

Q. Well, make the best estimate you can.

A. A couple a hundred dollar, I think so, I don't know sure right now——

Q. Well, was it one hundred, two hundred, three hundred?

A. Couple a hundred dollars, I think. That's what I remember, I was no—never pay any attention to it.

Q. You don't know?           A. No.

Q. That was an appeal also, wasn't it, just as much as the United States appealing for the war bonds?

A. No, this was a relief. That was not bonds; that was relief for something, I don't know, I can't understand. They just come around and ask me for, I give it to him. He says this is not taxable for you.

Q. You don't know how much you gave him?

A. Well, I—really, a couple a hundred dollars, I think, I don't know sure.

Mr. Gagliardi: I am objecting, Your Honor, that is incompetent, irrelevant and immaterial, pursuing this subject farther now.

The Court: Objection overruled.

Q. What efforts did you make to get this other book of account that you say Mr. Ray had?

A. What do you mean, efforts? I can't——

Q. What did you in order to try and recover this book that you say now, Mr. Ray had when he died?           A. Uh-huh.

(Testimony of John E. Barcott.)

Q. What did you do about that?

A. I tried to find out. I found out after the Government go after me, and I found out where is the book. He was keep all those files for me, and everything as that.

Q. Where did you go?

A. I go to Mr. Ursich, and Mr. Ursich called up for it.

Q. You went to Mr. Ursich, is that right?

A. Yeah.

Q. When did you do that?

A. Oh, that was after the Government come in there and ask me for it. [233]

Q. Well, do you mean to say that in 1946 was the first time you looked for that book that you say you lost in 1943?

A. I no need a that book at all. That was in my file and Mr. Rays got everything, social security, employment compensation, everything else it was in his office.

Q. Well, didn't you say on this stand that you started this book in July, 1943, because you couldn't get the other book from Mr. Ray?

A. Well, he was a sick, that's the reason I can't get it.

Q. And so you didn't ask anybody for it, but you started a new book?

A. I started a new book, yes.

Q. But you never asked anybody for the other book.

A. Well, I never paid attention to it, no, as long as I got that book, that was all right.

(Testimony of John E. Barcott.)

Q. In other words, you didn't look for the other book at all. You just started a new book——

A. Oh, I no look. I know this, that that book was in his possession, and so I no was looking for.

Q. So it wasn't until 1946 that you went to look for the other book, is that correct?

A. Yeah, that's right.

Q. And you asked your attorney to——Mr. Ursich to—— [234] A. Yeah.

Q. ——find that book for you? A. Yeah.

Q. What did he do in order to find it, do you know?

A. Huh? He called up some place over there, I don't know where——

Q. Were you there when he called up?

A. No, I no was there. I told him, I says, "What's a happened to 'em?"

Q. You don't know what happened after, you just told Mr. Ursich that you lost it—you told him that in 1946?

A. I was——when I check up, you know, when the Government they want my—to see my book and check me up and I went—try to go through that file and I got right there—see, the Mr. Ray was ready—the second time he was a pretty sick, he bring all that bunch of file on my place. And he was there, I was always figure he did all my business.

Q. Well, then, do you want to tell this Court and this jury now then, that you started this book but

(Testimony of John E. Barcott.)

you didn't ask Mr. Ray or anybody for the old book, is that right?

A. I no ask him for no books.

Q. You didn't ask Mr. Ray or anybody for the old book, until you asked Mr. Ursich in 1946? [235]

A. Well, the only thing I asked Mr. Ray, that was around September, you know—I mean September, October, he do the figure. He was keep a book, I know he—there was a file in his office. He was figure he was going to do the job for me again, so that's the reason I keep those books there——

Q. Well, let's get this straight, Mr.——

Mr. Pomeroy: May I have Defendant's Exhibit A? A-1?

Q. As I understand it, this book was started, Defendant's Exhibit A-1 was started July 28, 1943, is that correct? A. Yeah, that's right.

Q. And at that time you think that Mr. Ray had your other book, is that right?

A. Mr. Ray was—was—he gotta sick.

Q. Where is the book—where is the book that preceded this one, the book ahead of this one?

A. On that one there, it was in Mr. Ray office, and he asked me for, he says, "What's the idea of this, Ray?" Then Mr. Ray asked me for, I says——

Q. Just a moment please. Answer my question. Do you know where the other book is that precedes this book, that is ahead of this book? [236]

A. That was in Mr. Ray office all the time.

Q. Do you know where it is now?

A. I don't know where it is.

(Testimony of John E. Barcott.)

Q. Do you know where it was on July 28th, 1943?

A. I know it was in Mr. Ray office.

Q. Why didn't you get it in—on July 28th, 1943, instead of starting this new book?

A. Well, I can' get into, he was in hospital.

Q. All right. When did you again ask him for it?

A. That was—that was quite a bit later, maybe a month or—when he come back from the hospital. I ask him for it.

Q. Oh, you did?           A. Yeah.

Q. All right. What did he say?

A. He says, "All right, John, here's your book, and I fill 'em up this social security, you can't work, and the more——"

Q. What did he do with the book? Did he give it to you?

A. I bring it down; I fill 'em up those thing, then I told him again, I says, "Mr. Ray," I says, "I want you come in, getta my book——"

Q. What did you do with the book?

Mr. Gagliardi: I suggest that counsel [237] allow the witness to answer the question now, Your Honor.

Mr. Pomeroy: That's what I'm trying to get, a responsive answer.

Mr. Gagliardi: Well, I think interrupting will——

(Testimony of John E. Barcott.)

Q. Did you give the book back to Mr. Ray again?

A. Yeah, I did, and you know he had to figure how much we take in for six months on that.

Q. And then what—when did you go to get it again?

A. Never, I never, he just leave 'em—he leave 'em there in the file with the rest of the things.

Q. He left it in the file? A. Yeah.

Q. And then you never paid any more attention until——

A. I never—I never bother, I no need to. I never bothered.

Q. Was that book all filled up?

A. Which one?

Q. The one that you left with Mr. Ray?

A. Well, I can't—it was there before, then he was get sick and I can't get into it.

Q. Was the book that you left with Mr. Ray, filled up to the last page?

A. It was—I think it was a part of it, but——

Q. Did you have to start this book because the other book was filled up?

A. No, I had to start this book on account of Mr. Ray was sick. I can't get into the office, I don't know what his file is.

Q. Have you had any fires in your place of business? A. 1938.

Q. When else? Any other time?

A. There was July, I think, July 15, for about two weeks, July 15 we had a little fire.



(Testimony of John E. Barcott.)

Q. July what?

A. July—between July 15th or something like that, but I——

Q. What year?

A. 194—'43, I think.

Q. July, 1943, you had a fire in your place?

A. I think the books show there that we was closed for a couple of weeks.

Q. Well, what book, do you mean this book?

A. I think that one there, I think so.

Mr. Pomeroy: Will you hand this book to him and have him tell us when it was that they had that fire?

A. There it is right here.

Q. What date? [239]

A. That was July '43—July 19—July 18, it was, closed there.

Q. July 18th, 1943?

A. 18, yeah. And two week we was closed there.

Q. Your statement is that you've made money all the time that you've been in the California Oyster House, is that correct?

A. Yes, sir.

Q. And that you saved all that money because your—you and your family have lived on the tips that your wife received working as a waitress in the California Oyster House. Is that what you want this jury to believe?

A. Well, she take care of the expenses at home on tips.

(Testimony of John E. Barcott.)

Q. Well, that's what your family lived on. And you saved all your money that you've earned.

A. And food I would take from the place home.

Q. And food that you took from the place home.

A. Yeah.

Q. Otherwise, all the expenses were paid by your wife's tips? A. Yes, sir.

Q. And how much—how much a month did you earn during that period of time?

A. Myself? [240]

Q. Well, how much did you receive from the California Oyster House, the operations of it?

A. That was running from two-fifty to three hundred-fifty, four hundred dollars.

Q. Every month?

A. Every month, clear money.

Q. And you made money all the time?

A. Absolutely, else would I be there.

Mr. Pomeroy: Will you mark this, please?

The Clerk: Plaintiff's Exhibit No. 18, for identification.

Q. You are being handed what is marked for identification as Plaintiff's Exhibit No. 18. Does your signature appear on that? Is your name on that? Did you sign that any place? You may look through it.

A. It's a name here, John Barcott.

Q. Did you sign it? A. Yes.

Q. And what—what is that instrument?

A. That's income tax report.

Q. For what year? A. 1940.

(Testimony of John E. Barcott.)

Q. And you say—did you make money that year, or lose money that year? [241]

A. 1940 we remodel the place.

Q. Did you make money or lose money that year?

A. Well, that year we was a losing money, but that was—we was remodel place.

Q. You didn't make any money that year?

A. No, that year, no.

Q. You reported a loss, didn't you?

A. Yeah, account of the—account of the repairing, remodel. That was Tom Ray take care of, I got nothing to do with those things—I don't know, I turned everything over to his hands.

Q. And you charged yourself off with a hundred dollars of the food that you ate for the year, is that right?

A. I eat down the place.

Q. A hundred dollars for—

A. Well, that means I eat the meals, my meals, when I'm working down there.

Q. That's all you ate, was a hundred dollars worth for the year?

A. That's all, just one meal a day and sometime just breakfast, that's all. The rest of the meal I eat at home.

Q. You say the only reason that you show a net loss here is because of the alterations of the place?

A. Yeah, I think so, that's up—it was up to him, everything. I don't know nothing about those things.

(Testimony of John E. Barcott.)

Q. Well, you know that you remodeled the place, don't you?

A. Yeah, I know we remodel, we spend the money for the place.

Q. And how much did it cost you to remodel it?

A. I can't remember that really.

Q. What did you do with the slips or ticket off—tape off of your cash register?

A. I give it to him to check up how much money we spend on the place.

Q. You gave your cash register tape to—what did you do with that when you—

A. Oh, no, I no say about the cash, I say about what we spend on the place to remodel.

Q. What did you do with the cash register tape?

A. I throw it away, I think.

Q. You throw it away? A. Yeah.

Q. What did you do with the purchase slips when you bought something?

A. Well, never keep it.

Q. You just destroy those too?

A. Well, when the fifteen days or month is over, I no [243] bother with them at all.

Mr. Pomeroy: I'll offer Exhibit 18.

Q. Did you tell the Court and the jury—

Mr. Pomeroy: Oh, pardon me, until you pass on the exhibit.

Mr. Gagliardi: No objection.

The Court: It may be admitted in evidence.

(Testimony of John E. Barcott.)

(Whereupon the income tax return of John Barcott for the year 1940, was admitted in evidence as Plaintiff's Exhibit No. 18.)

Q. Did you tell the Court and the jury that you didn't have much in the way of household furnishings out at your house?

A. No, I did not.

Q. What did you tell the Court this morning about that?

Q. What do you mean, which way you want?

Q. You say—do you know anything about the household furnishing at your house?

A. Yeah.

Q. Well, who bought those?

A. Mrs. Barcott takes care of it.

Q. Did she pay for everything you have in the house?

A. She pay—yeah, she pay that. [244]

Q. What kind of a refrigerator do you have out there? A. We got Philco refrigerator.

Q. When did you buy that?

A. Well, about 1938 or something like that.

Q. About 1938? How much—

A. I can't tell you sure what year.

Q. How much did you pay for that?

A. I don't know, she was—she knows that, something—what it cost.

Q. You don't know how much.

A. She went buy that stuff.

Q. And she bought it out of her tips?

A. Yes sir.

(Testimony of John E. Barcott.)

Q. What kind of a stove do you have out there?

A. I got a electric stove.

Q. And when did you buy that?

A. That was buy about the same time, that time.

Q. About the same time.

A. I don't know what year is.

Q. About 1938?

A. I don't know the year really.

Q. Well, when do you think?

A. She was working in 1938 and that time she give me, she give me everything, she take care of it to that time, [245] but I——

Q. She gave you what?

A. Money that was made out of the tip, if there was anything over, she paid all the expenses at home.

Q. How much did she give you?

A. Well, every time she was over so much, she give it to me and turn it to me.

Q. How much did she give you in 1938?

A. 1938 that was—I can't tell you. I didn't keep track of it.

Q. Besides that, she paid for the stove and the refrigerator, is that right?

A. If I bought it in 19—over—before 1938, she was take care of it; but if I bought it after that, I can't tell you sure. I think I have to take care of it then.

Q. Where did you buy it, do you know?

A. I think Overland's, music company there, someplace.



(Testimony of John E. Barcott.)

Q. Overland music company.

A. Yeah.

Q. Did you buy it, or did she buy it alone?

A. She was over there to take care of that thing.

Q. Did you go over there at all? A. Huh?

Q. Were you—— [246]

A. I went once there.

Q. You went to *took* at it before she bought it too, did you? A. Yes.

Q. Did you pay any money for that yourself?

A. No, not right away.

Q. Well, when did you? Later?

A. Oh, it was later, it was kind of a account there for a while there.

Q. Account there for a while?

A. Yeah, I think I was take care of that, I'm not sure.

Q. Did you pay for it then, on the account, or did she pay for it?

A. Oh, I was—if we bought it after '38, I was take care of it myself.

Q. In other words then, you paid for the stove, is that right, over at that electrical——

The Court: Who paid for that?

Q. You didn't—she didn't pay for that out of tips, you paid for that.

A. Well, she was no working after that, after 1938.

Q. So you paid for the stove, then?

A. Well, I believe that, I think, though out of the money.

(Testimony of John E. Barcott.)

Q. What kind of a furnace do you have out there? A. We have got no furnace. [247]

Q. No furnace at all? A. No sir.

Q. How many stoves do you have in the house?

A. There's two.

Q. Two of them.

A. What do you mean?

Q. Stoves. What kind of heat do you have in your house?

A. I got oil stove, that goes the whole days.

Q. Oil stove. A. Yeah.

Q. Is that what you have now?

A. No, I got electric stove.

Q. How many? A. Couple.

Q. Couple. A. Yeah.

Q. When did you buy the second one?

A. That was—let's see, that was two, three years ago.

Q. Who paid for that?

A. I was take care of it, I——

Q. You paid for that.

A. I was take care of that. We sold our other—remember, we sold our other stove, we take care of on that money.

Q. Uh-hum. Who paid—who paid the telephone bill out [248] at your house—do you have a telephone? A. Yes.

Q. Did she pay for that out of her tips?

A. No, I pay now, but she used to pay before herself.

Q. She paid that out of her tips.

A. Yes.

(Testimony of John E. Barcott.)

Q. Now you pay it.           A. Yes sir.

Q. How long have you paid it?

A. Since she quit working.

Q. 1938?           A. Yeah.

Q. Telephone. Electric lights, who pays for those?  
A. I pay now.

Q. You pay now. She paid for that out of her tips before '38, is that right?

A. Yes, she give me the money, or either she did it herself.

Q. She gave you the tip money and you went and paid it?

A. Well, I was have to write a check or something like that, I paid for; if she knows, she pay it herself.

Q. Do you ever go to church, and give the church any money?  
A. Well, little bit.

Q. And who gave that, did you or your wife out of her tips? [249]

A. The last, the last—after '38, I do myself.

Q. After '38, then, you gave to the church?

A. Yeah.

Q. But before that, your wife gave the money out of the tips, is that right?

A. Well, let's—I don't know, we give it to 'em or no in those days. I can't tell you sure, I can't tell you how much money we give 'em before. There was no very much money a month on that.

Q. Not very much money.           A. No sir.

Q. You don't know where it came from?

A. What do you mean?

(Testimony of John E. Barcott.)

Q. Well, where did the money come from, your wife's tips or from what you earned?

A. Well, before '38, if there was anything, it was—if there was anything expenditures in the house, it was her money.

Q. Was there a lot of tips during the depression years?

A. Absolutely, she was doing good—she was making good money there.

Q. She made good money out of tips during the depression, then?      A. Yes sir. [250]

Q. How are the tips now, better than during the depression years?

A. I don't know what they are, I never ask anybody anything.

Q. You never went to any shows or any entertainment of any kind?

A. Oh, once in a while I go in a show, but no nothing else. I never go no place.

Q. Did you pay that money out of your wife's tips, or did you pay it out of your own money?

A. What do you mean—why, now since she quit working, I pay my own self for it when I go to the show.

Q. Well, you're talking about twenty-four years, that's what you were telling the Court about, that for twenty-four years you've saved all your own money, and that's how you have so much money.

A. Well, that's no matter, that's all I go, you see I go to the show once——

(Testimony of John E. Barcott.)

Mr. Pomeroy: Will you please recheck this paper, and read the question directly to the witness? You may read the question to him.

(Question read.)

Q. And you and your family lived off of your wife's tips. [251] Now I am asking you whether or not you went to the shows and things like that, entertainment, that your wife paid for that out of her tips?

A. That no amount to nothing, I never go very much in the show.

Q. Well, when you did go, did that money come out of your wife's tips or not?

A. No, before—no after that—before, I never—I don't want nothing, I never ask for four bits to go to the show.

Q. You paid for that yourself then?

A. I got money in my pocket, but it no amount to nothing.

Q. When you bought a suit of clothes, did your wife pay for that out of her tips too?

A. No sir.

Q. Did you pay for that yourself?

A. I got myself once in a while a suit of clothes.

Q. When you bought a pair of shoes or a pair of socks, did your wife pay for that out of her tips?

A. No, no her, no her, no out of that.

Q. When the kids went to school and you gave them some money, did your wife pay that out of her tips?

A. When they was working, yes.

(Testimony of John E. Barcott.)

Q. When they were working. [252]

A. Yes sir.

Q. Then you paid them?

A. When she was working she did, she furnished the kids and everything supposed to be in the house.

Q. Out of her tips?                      A. Out of her tip.

Q. Did you pay her any money for her wages?

A. No, never was——

Q. All she lived off was her tips?

A. Yes sir.

Q. And she supported you and the kids out of her tips?

A. Support, there's no support—support the home, pay the expenses in the home.

Q. That's what I'm talking about. She paid all those out of her tips, and you saved all your money?

A. Yes sir, I saved everything.

Q. You never bought any food outside of what you took home from the restaurant?

A. I always took from the restaurant.

Q. Never bought anything anyplace else?

A. Well, fish and meat and all that stuff all come in from the restaurant——

Q. Did you buy any food anyplace else except taking home from the restaurant? [253]

A. We buy a chicken sometime, not very often.

Q. Did she buy that out of her tips too?

A. She buy over there all the expenses home there.



(Testimony of John E. Barcott.)

Q. Did you ever buy any food for the house outside of what you took home from the restaurant?

A. Why, myself?

Q. Yes.

A. No, she was take care of that home expenses.

Q. Did you ever buy anything, food for the home, yourself?      A. After '38, I did.

Q. After '38 you did.      A. After 1938 I did.

Q. What did you buy?      A. Huh?

Q. What did you buy?

A. Sometime chicken or loaf of bread, or something like that, but no very much.

Q. I suppose you have a lawn mower out at your house, don't you?      A. Yes.

Q. Who bought that?

A. After '38 I did, little bit out of——

Q. You bought that yourself.      A. Yeah.

Q. That didn't come out of your wife's tips.

A. Not after '38.

Q. When you had Christmas presents to buy, did you buy those out of your wife's tips too?

Mr. Gagliardi: There is no evidence there was any Christmas present given, your Honor. I am objecting to the line of questioning. He has gone too far now to be proper cross-examination.

The Court: The questions have to be limited, of course, but then I shall overrule the objection.

Mr. Pomeroy: Will you read the question to me, please?

(Question read.)

A. I no buy Christmas presents, she was take care of all that business.

(Testimony of John E. Barcott.)

Q. Did she buy it out of her tips?

A. What do you mean, now?

Q. Did you give—— A. Now?

Q. Before '38.

A. I no buy Christmas presents, she was take care of all that business.

Q. When you paid for your safe deposit box, did she pay [255] for that too, out of her tips?

A. No, I pay the—I pay the—that's only is a little amount of money on the year.

Q. When you did any gambling, did she give you the money to gamble with?

A. I never gamble, I never smoke, I never go no place.

Q. You never played cards with any of your friends? A. No sir.

Q. Never at any time?

A. No sir, I was working ten or twelve hours a day, every day.

Q. Never played a little friendly game with your friends?

A. I don't know what the game is.

Q. You don't know what it is——

A. That's you're asking for, no.

Q. I'll ask you whether or not, Mr. Barcott, on or about February 13, 1946, in Mr. Harry Swanson's office, in the Internal Revenue office, with Mr. Swanson being present, Mr. Nielsen and yourself, if you didn't tell those two Revenue Agents that you occasionally played a friendly game? A game——

A. No sir, absolutely wrong, I don't know nothing about the game.

(Testimony of John E. Barcott.)

Q. Never did, never—— [256]

A. If there is any person in Tacoma see me that I played a game, well, you can hang me if you want.

Q. Well, the question I am asking you is whether or not you told these two men that statement. A. I never say that.

Q. You never——

A. They are wrong when they say that.

Q. You never said that? A. No sir.

Q. When was it that you rented this box in the Washington Building? A. What was?

Q. When did you rent that box in the basement of the Washington Building?

A. I think three, four—four or five years ago, I don't know sure what the date.

Q. Four or five years ago. A. Yeah.

Q. Didn't you testify here, it was 1943, a little while ago?

A. Three or four years, I can't tell you for sure.

Q. And what was the reason for your renting it?

A. Huh? What was the reason what?

Q. That you rented that extra box, that other box in the [257] basement of the Washington Building.

A. The fella who's took care of those boxes is our customer, and beside I need a box for, I got lots of policies, and lots of paper, and lots of lease and other stuff to keep, and that things, and I started to buy bond over there there wasn't enough room in that box over there to keep all that business. There was all that stuff in my place there.

(Testimony of John E. Barcott.)

Q. So you had—didn't have enough room in the box in the National Bank of Washington——

A. No sir, those policies and——

Q. Those policies.

A. ——the Slavonian-American Benevolent Society stuff and everything else.

Q. So then you went ahead afterwards, though, and bought all these bonds, didn't you, after you bought the new box, and put those in the first box. How did you have room for all the bonds you bought after that in the first box when you didn't have enough room back when you rented the box in the basement of the Washington Building?

A. I think—I don't understand what you mean.

Q. You bought all these bonds after——

A. Yes. [258]

Q. ——you rented the second box, isn't that correct?      A. Yes.

Q. And you put them in the first box, didn't you?

A. In the Washington National Bank.

Q. That's right.

A. Well, that's where they belong.

Q. But, you had room enough for all these bonds you bought in that box, didn't you?

A. Well, that, they was right there, yeah.

Q. Well, I thought you said you didn't have any room in there and that's why you had to rent the second box.

A. No, I had bigger box in 1943, '44, on that there.

(Testimony of John E. Barcott.)

Q. Uh-hum.

A. To keep those thing, but I got no room to keep the rest of the policies and stuff like that on that place, and I don't want it mixed up with that, anything with that kind of a stuff there.

Q. You don't want your insurance policies in with your bonds and money, is that what you mean?

A. No, I say, I got so damn many stuff there.

Q. You got so many that you don't want your insurance policies in with your bonds?

A. When the bonds and money was there.

Q. How was the restaurant business in 1946, as compared to [259] 1945, and '44 and '43, Mr. Barcott?

A. It was lots better.

Q. Lots better.

A. Yes.

Q. You are again being handed Defendant's Exhibits A-1, Mr. Barcott. Can you tell me what your receipts were for February 1946?

A. I ain't got know in this book, I no—I got nothing to do with that.

Q. You don't know?

A. No, my son keep the bookkeeping and keep the—he's got a bookkeeper and take care of that business.

Q. It doesn't show in that book.

A. No, except a couple months.

Q. What months does that book in here?

A. January, February.

Q. February, when?

A. February, let's see—28th, yeah.

Q. What year?

A. 1946.

(Testimony of John E. Barcott.)

Q. How much did you take in during the month of February 1946?

A. I can't figure out right now, but it's right here in this book, that's where it is. [260]

Q. Was it eight thousand, two hundred and forty-one dollars and thirty-five cents?

A. I can't tell you sure, I never—I give it to accountant to figure in this thing when I report my income tax 1946.

Q. Wasn't that the month during the two-week period when the Internal Revenue agents checked your restaurant?      A. Yes.

Q. Can you now tell us how much the gross receipts were for February 1946?

A. You mean gross all those years?

Q. No, how much did you take in during the month of February 1946?

A. Month of February. I never—I never figure those things. I give to the accountant to figure how much the gross receipt, it is right here in the book, everything that was take in.

Q. The figures are shown here, is that correct?

A. That's what it is.

Q. And if those figures that you have there add up to eight thousand, two hundred and forty-one dollars and thirty-five cents, that is the correct amount of income for the month of February 1946, is that correct?

A. I think so, I give it to accountant to take care of that, [261] and I think it is all right—everything all right. I no copy all this.



(Testimony of John E. Barcott.)

Q. All right. Now I'll ask you how much you took in during the month of February 1945.

A. It's right here in this book——

Mr. Gagliardi: The book is in evidence.

A. ——I can't tell you out of my mind.

Mr. Gagliardi: If your Honor please, I am objecting that counsel is asking the witness when he has the book in evidence, and the book speaks for itself. And besides, I don't think it is fair comparison between 1946 when the ration went off.

The Court: Objection will be overruled.

Mr. Gagliardi: Note an exception.

Q. If those figures are added that you have there for the month of February 1945, is that the correct amount of income for that month?

A. 1945?

Q. Yes.           A. Everything was here.

Q. And if that figure shows the figure was six thousand, five hundred and thirteen dollars and ten cents, that would be the correct amount of income for the month of February 1945, is that right?

A. Yes sir. [262]

Q. What income did you have for the month of February 1944?           A. It's right here.

Q. Do you have it in there?           A. Yes sir.

Q. Tell us how much it is.

A. Well, I can't tell you here how much it is. I know—this is no accountant figuring it.

Q. Did you have a bookkeeper though, during that period of time?

A. No, I got no bookkeeper.

(Testimony of John E. Barcott.)

Q. Who put those figures in that book?

A. I put the figure in myself there how much we take in.

Mr. Hale: If your Honor please, counsel must be laboring under a misapprehension. This book represents the figures per week; now if he wants the witness to calculate the respective totals, we'll have to ask for some time. He can't sit there and give a month's total.

The Witness: I can't tell you anything out of this thing here and give the figure.

The Court: Well, you can very well settle that question. Is it a week instead of a month? [263]

Mr. Pomeroy: He has the total there weekly, that's correct.

The Court: Well, eighty-two plus, is that by the week or month?

Mr. Pomeroy: No, that's totaled by the month. The sixty-five hundred is totaled by the month of February, 1945.

Q. And if the figures in that book for February 14, 1944, totaled six thousand, four hundred and sixty-nine dollars and ninety-five cents, then that would be the correct amount that you took in in February 1944, is that correct?

A. There was everything here that I take in right here in this book.

Q. And it was during the month of February, 1946, that the Internal Revenue agents checked your cash register, is that right?

(Testimony of John E. Barcott.)

Q. And were the figures exactly the same as to amount of cash that you took in and the amount of figures that you had on the cash register?

A. That's the figures I take the cash out of it, thats where I get the figure out of.

Q. You made up your own packages each day on this two-week check, didn't you?

A. What? [264]

Q. You made up your own package for each daily——

A. Well, I save every day what there was take in.

Q. And actually the difference was between nothing and about fifty-seven dollars and thirty-five cents a day that you were off on your figures, isn't that right?

A. I never check all those slips.

Q. You never checked the slips.

A. I never know anything about it.

Q. You don't know whether your sales tickets and your cash register checked, or anything?

A. I never check those slips at all. I never find any money in the register. Everybody go in the register; everybody take the cash in that place.

Q. In other words, you think somebody goes in and takes some of the money out of the cash register.

A. I don't know they take no, I never did.

Q. Well, do you think somebody else did, is that why the difference?

A. I don't know what's a happen, everybody get in that register, everybody take the cash there.

(Testimony of John E. Barcott.)

Q. Everybody takes the cash?

A. Yes sir.

Q. Who do you mean by everybody?

A. Well, all the people that work for me there, cooks, the [265] waiters, and everybody else goes in that cash register.

Q. So you really don't know how much you have in that cash register, is that right?

A. Well, it's when I—the next day I count the cash, then I find how much cash I got, but I no take the cash during the week. I got no cashier.

Q. Did you check the amount of the sales slips with the number of meals——

A. No, I never did, I never done anything, I never know that there was that things there either. I never—I trust everyone.

Q. You trust everybody?

A. I trust all people who was working for me there.

Q. You trust everybody that works for you.

A. Absolutely, I let everybody go in the register, so I trust everybody.

Q. And you went in the register too, didn't you?

A. In the morning I was in the register, and I take the cash.

Q. And you went in during the day too, didn't you?      A. No sir.

Q. You never went in the register.

A. No, I never cash in anything.

(Testimony of John E. Barcott.)

Q. Mr. Barcott, how much money did you have saved in 1940? [266]

A. Oh, around—in 1940 you mean? From 1919 to 1940?

Q. How much money did you have that you had saved in 1940? A. I think——

Q. At any time in 1940. A. 1940?

Q. Yes. A. I can't tell you.

Q. Approximately.

A. No, I can't tell you that thing.

Q. Do you think you had a hundred dollars saved? A. What do you mean?

Q. Well, I'm asking you how much you had saved. A. I can't tell——

Q. You know what a hundred dollars is, don't you?

A. There was money all in a bunch there, I can't tell you how much I saved.

Q. Did you have fifty thousand dollars saved?

A. What do you mean, from what? 1940 one year?

Q. No, all together.

A. I was—maybe more than that, quite a bit more.

Q. Sixty thousand?

A. About sixty- sixty-five thousand or something like that.

Q. Well, why didn't you pay off the two hundred dollars that you owed to the Fishermen's Packers Corporation [267] and get your stock?

(Testimony of John E. Barcott.)

A. There was the company was in a bad shape at that time. I no want to—they didn't know if they were going to stay there or no. That's the reason I no pay 'em.

Q. You got—you got ten per cent on your dividends, didn't you? One year?

A. Later that, but no before.

Q. You got six per cent another year, didn't you?

A. Well, the last two or three years.

Q. You got six per cent another year, didn't you?

A. Last two three years, three four years, that's all. Before she never make any money.

Q. And you owed them money since—from 1932 to 1940, isn't that right?

A. Well, they was still in that company, I no want to pay anything on that.

Q. Well, you finally—you finally made a settlement with them whereby you let them have four shares of stock, isn't that it?

A. Yeah, I just give it up to the company was four shares. At that time the business, the fish business, no was very good on that company.

Q. Well, you didn't try to sell the rest of your stock, did you? [268]

A. Huh?

Q. You didn't try to sell the rest of your stock.

A. I was keep it.

Q. You kept it? A. I keep it, yeah.

Q. But for eight years you didn't pay off that two hundred dollars, did you?

A. I never bother with them, you know.



(Testimony of John E. Barcott.)

Q. You never bothered with them. But you owed that money all that time.

A. Well, the company was—we figure once that we gonna lose all that money on that company was in bad shape.

Q. And you're telling this jury that you had sixty or seventy thousand dollars in the bank, and you were still paying on an account on an electric stove down at the electric company, isn't that right?

Mr. Gagliardi: I your Honor please, I am objecting. Counsel's method of cross-examination is he is repeating the question over and over again. He has to answer half a dozen times.

The Court: Objection overruled.

Mr. Gagliardi: Note exception.

Q. You had sixty or seventy thousand dollars saved up, but [269] still you were paying on an account, on a time contract, on that electric stove down at the electric company, isn't that right?

A. That's right. What's the difference in that?

Q. Don't argue, please. Just answer the question.

Mr. Gagliardi: The counsel, I'm asking again, your Honor, that counsel be admonished. He argues with the witness, the witness has the right to argue back.

The Court: Let's get along——

Mr. Gagliardi: I am trying to, your Honor. I'm trying to get along the best I can.

The Court: The Court is going to run on this case, now, and direct the manner in which matters may be presented.

(Testimony of John E. Barcott.)

Mr. Gagliardi: I am appealing to the Court for the protection of this witness, which I think your Honor has to protect the witness.

The Court: The Court has ruled. Counsel will be seated.

Q. As a matter of fact, Mr. Barcott, on June the 10th of 1940, that Fishermen's Packing Corporation paid you a six per cent dividend, isn't that correct? A. I think so. [270]

Q. And you did not pay off your two hundred dollar debt to them until you settled with them by transferring stock to them in cancellation of the two hundred dollar note in 1940.

A. Well, there was a some kind of a mess in there, you know. I no was pay any attention to that stuff you know.

Q. Didn't you——

A. You see once I was ready to lose that stock all together, the fish business it was so bad.

Q. Mr. Barcott, didn't you just get through telling this Court and jury that you weren't making any money out of it; however, now you're telling them that you made six per cent in June 1940?

A. There was some kind of a settlement come in there. If the company can't explain it to you, I can't explain it to you nothing on that deal. The man from the company can't explain it to you which way were these things.

(Testimony of John E. Barcott.)

Q. Well, in June 1940——

A. I tell you, I no was pay any attention to that. They no only settle with me that way; they settle lots of stuff over there in that company, the same way—the same condition I was.

Mr. Pomeroy: What time are you taking [271] recess, your Honor?

The Court: I thought we would run until about fifteen minutes after the hour.

Mr. Pomeroy: I thought if I could have a few minutes now, I could coordinate this and maybe rush it through faster than having to go through notes, your Honor, in a skimpy manner.

The Court: Very well, the Court will be at recess now for fifteen minutes. The audience will remain seated until the jury pass from the jury box. There will be an intermission of fifteen minutes.

(Recess.)

The Court: Now you may proceed, and Mr. Barcott will take the stand again.

Q. Mr. Barcott, 1929 was the first year that you ever made an income tax return, is that correct?

A. I think so.

Q. You paid twelve dollars and seven cents that year, is that right?      A. I think so.

Q. And then you made no income tax return until 1936, is that correct?      A. I think so.

Q. You paid seventeen dollars and twenty-five cents that [272] time.

A. Yeah, I think.

(Testimony of John E. Barcott.)

Q. And in 1937 you paid three dollars and eighty-one cents, is that correct?

A. I think so.

Q. And in 1938 you paid ten dollars and twenty-nine cents, is that right? And in 1939 you paid no income tax, is that right? A. 1939?

Q. You made no return.

A. Didn't I make no return in 1939?

Q. 1940, then. You paid no income tax, is that correct?

A. 1938 the place had burned up, and the attorney is supposed to take care of the estimate on those things.

Q. Well, you paid ten dollars and twenty-nine cents tax, that's correct.

A. I don't know. It was in his hands to take care of that business.

Q. And in 1939 you paid no income tax.

A. The attorney was to take care of that.

Q. But at that time you had on hand about sixty thousand dollars, according to your own testimony here, is that right? A. That's right.

Q. You had sixty thousand dollars on hand, but you had only paid the income taxes that I have just called off here. That's your testimony. Now, in 1929, how much money did you have saved then?

A. 1929. I can't tell you.

Q. Do you know much money you had saved in 1929?

A. I say I was making good money. Save good money. I save good money and I was working good.

(Testimony of John E. Barcott.)

Q. About how much money did you have in the bank which you saved, let's say how much money did you have saved all together, whether it was in the bank——

A. I can't tell you.

Q. ——or in the boxes in nineteen hundred and thirty——

A. I cant tell you that figure.

Q. Well, in 1929 you bought an interest in this boat, didn't you?      A. 1929, yes.

Q. How much did you pay for that interest?

A. Five thousand, three or four hundred dollars, I can't tell you sure.

Q. About fifty-two hundred dollars, wasn't it?

A. Yeah, something like that I think.

Q. Then you went on a note up at the bank in Everett, didn't you? [274]

A. No, I got nothing to do. I pay mine cash.

Q. Did you sign any note at the bank in Everett?

A. I sign a note on account of those, I had to pay, I got so much money myself—my share was all the cash, it was between three partners.

Q. That's right. Your share was paid.

A. Pay the cash.

Q. But the other two partners——

A. The other two partners, he's got no money.

Q. So you signed a note up at the bank in Everett.

A. I had to sign for them once, for them note, to borrow that money for rest of the operation.

(Testimony of John E. Barcott.)

Q. To mortgage the boat. A. That's right.

Q. Is that right? A. That's right.

Q. But you had plenty of money at that time yourself. You could have loaned it to them——

A. I ain't got the money.

Q. You could have loaned it to them yourself, rather than sign a note, if you——

A. No, I no have to do that.

Q. You don't have to do what?

A. I don't have to loan the money to them guys. Why I [275] want to loan the money to them fellas to go in business? I take the big chance, fifteen thousand dollars or sixteen, to put on that boat.

Q. So you signed away, though, you're—I mean, you signed the mortgage on the boat.

A. I signed the mortgage for those guys, to help them out.

Q. And then, that first year on the boat you made about how much money?

A. I got one-third of the share out of it, that business.

Q. How much a share did they pay out of that boat that year?

A. Well, I think we made—I made—I made around, on my share—well, its a share, we made a fifteen hundred dollars on a share. We figure our share, and I call the share one-third. So you figure how much money I got out of that.

Q. Twenty-four hundred dollars, is that correct?

A. It must be.



(Testimony of John E. Barcott.)

Q. And you were making good money at the restaurant at that time.

A. Oh, it was pretty fair.

Q. How much did you make in the restaurant that year?

A. I can't tell you sure what that was.

Q. Did you make five thousand dollars at the restaurant? [276]

A. No that year.

Q. Did you make three hundred dollars a month? Didn't you just tell this jury that you were making good money at that time?

A. Well, it was average I made that much money. Saved that, yeah.

Q. How much money?

A. Between two hundred fifty dollars, three hundred dollars, three fifty.

Q. Then you're—you call that good money, is that it?

A. Seems to me it is all right, but I saved that money, yeah.

Q. So you made twenty-four hundred dollars off of the boat, and about how much from your business then?

A. I can't tell you sure how much it was.

Q. You can't tell for sure, but you saved——

A. But I save, I save, yeah. Well, that was a saving there, it showed a report there.

Q. But you saved all the money you made from the business and what you got from the boat. You saved all that money?

A. I saved that both—both money, yeah.

(Testimony of John E. Barcott.)

Q. And you were living on the tips that your wife took in.

A. She was take care of it, yeah. [277]

Q. That's what you're telling this jury now, that you lived then on what, tips of your wife?

A. She was take care of it, that whole house business, I mean it's all home expenses and everything else.

Q. Then, how much did you make on that boat the next year?

A. We made around a thousand dollars, I think, on the share.

Q. That would be about thirteen hundred dollars for yourself, is that right?

A. Remember that this boat the first year, there is supposed to be some depreciation on it, you know.

Q. Some what?

A. There's a big depreciation on that boat, every year some depreciation.

Q. Some depreciation.

A. Depreciation on the boat the first year. I don't know how much it was supposed to be. And the nets and everything else. There's no full amount, and there had to be, no clear money on that.

Q. Well, how much clear money did you get?

A. Well, it's a clear, I don't know. I made that much money, I can't tell you clear how much it was.

Q. About how much? [278]

A. I don't know. I can't remember that.

Q. Was it a thousand dollars?

(Testimony of John E. Barcott.)

Mr. Ursich: I submit, your Honor, that the witness has answered the question.

A. It's pretty hard to figure myself those things. I know we got a book with every mark down there. I can't tell you that.

Q. All right. How much did you make in 1931 off the boat?

A. I think that was running between four and five hundred dollars. Between four or five hundred dollars of that, clear I got out of it.

Q. About three hundred dollars?

A. No, I know it was a little more than that, but I can't tell you sure what it was.

Q. Four hundred dollars?

A. Four or five hundred dollars, five hundred dollars, four or five hundred dollars, I think.

Q. How much did you make in 1932?

A. I was all along made that much money——

Q. About five hundred dollars a year?

A. Four or five hundred dollars a year, yeah.

Q. Four or five hundred dollars a year. In what year did you sell the boat? [279]           A. Huh?

Q. What year did you sell the boat?

A. 1936, I think.

Q. 1936?           A. Yes.

Q. Twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six—eight years, is that right?

A. I think so.

Q. And, then you sold the boat for how much?

A. I think thirty-five or thirty-six hundred dollars.

(Testimony of John E. Barcott.)

Q. And you lost how much money on the sale, on what you had originally paid for it?

A. I was pay five thousand and two hundred dollars, that's what I lost, that much on that.

Q. About seventeen hundred dollars?

A. I think so, it must be.

Q. Figuring it out at twenty-four hundred dollars on the first year, twelve hundred dollars on the second year, and five hundred dollars on the next six years, that makes sixty-six hundred dollars, is that right?      A. I believe it is.

Mr. Ursich: I submit to your Honor that those figures speak for themselves. [280]

Mr. Pomeroy: I'm just asking whether or not the——

A. I can't remember just what the figure is.

Q. I'm handing you again what is marked Defendant's Exhibit A-1, and can you tell from your figures in that book the percentage that your food ran to gross sales during the year 1943, or during any period of time in that book

A. '43, you mean.

Q. Uh-huh.      A. I cant tell you, no.

Q. You can't tell.

A. No, the prices was running bad, most of them in fish, you know. We can't tell what the——

Q. You can't tell the percentage.

A. No. You see, my place—my place running—the food cost quite a bit. You see, I got different kind of a set-up than the rest of the places.

(Testimony of John E. Barcott.)

Q. Well, would the percentage of—between the cost of food and the gross sales, be the same in 1943 as it was in 1944?

Mr. Ursich: I object to it, as calling for expert testimony, the witness is not qualified.

The Court: Objection will be overruled. [281]

A. Oh, I can't explain it to you.

Q. Would there be any difference?

A. Well, on the fish—on the fish business it had to be different.

Q. Well, in the restaurant business, you've been in it for so many years, isn't it a fact that you know about what your food costs you, compared to what you take in as your gross sales?

A. Well, there's the Princess Olympia oysters, those oysters, there never was ceiling price on that stuff. They was charged Olympia oysters, that may happen in our place, they can charge you—they was charging from nine dollars to eighteen, twenty dollars a gallon. So I can't tell you how much the food cost—the food cost in my place between those years, and that is because of those city items. City item caused that business. I can't tell you. That is main item in our business.

Q. Well, was there much difference between the year 1943 and the year 1944?

A. It depended the price, that's what I told you, in the fish business, or in the fish there, that was, may happen on the fish there.

Q. Well, was there much difference between the year 1943 and the year 1945? [282]

A. What you mean?

(Testimony of John E. Barcott.)

Q. In the percentage of what the cost of the food is to you and what you sell it for.

A. Well, the cost of the food was all the time more. You see there was things like clam that was out of season that cost of food cost quite a bit. Anyway, I can't tell you sure. There was no ceiling price on lots of things there, on our system we have down there.

Q. In other words, you know nothing about it except the figures that are in the book?

A. That's all there is.

Q. Do you—when did you first think of, or recall—when did you first recall that you had lived off of your wife's tips for the past twenty-four years?

A. What do you mean?

Q. When did you first think of that?

Mr. Hale: If your Honor please, we object to the form of the question.

The Court: Yes. Proceed.

Q. Did you tell the Internal Revenue Agents that you had lived off of your wife's tips for all these years?

A. They never asked me anything, I never tell them anything.

Q. They never asked you anything and you didn't tell them [283] anything. Didn't you tell this jury that you volunteered all the information that you could to them?

A. Volunteer information?



(Testimony of John E. Barcott.)

Q. Volunteered the information to them, about your sources of income.

A. No, not tip business. I never think that was the income business, on that tip business. I never think of anything that.

Q. Weren't you given an opportunity by the Internal Revenue Agents to tell them all the sources of your income?

A. I never speak very much with them.

Q. Did they ask you and give you an opportunity to tell them all your sources of income at the time that they were inquiring into your affairs?

A. I speak once with them, and my attorney was with me, I speak once between those books, that's all there is. I never speak anything on that thing. He never asked me any question where is the income go or anything else. They never asked me anything else.

Q. They never asked you what your sources of income were?

A. I was speak once with them.

Q. Well, you spoke with Mr. Nielsen once, didn't you?

A. Once, but he never asked me about the books or anything before. [284]

Q. Didn't you speak with Mr. Swanson and Mr. Nielsen again?      A. Yes.

Q. How many times did you talk to Mr. Swanson and Mr. Nielsen?

A. I was once—well, when we went down the book—box, the second time we was with my attorney then.

(Testimony of John E. Barcott.)

Q. Didn't you talk with them in your place of business also?

A. Just once, he come in and ask me, there's many what day——

Q. Did you talk to them at any time in your place of business?

A. Yeah, once they ask me——

Mr. Gagliardi: If your Honor please, I object——

A. ——for certain question.

Q. Then did you go up to the office, his office, Mr. Swanson's office another time?

A. Not myself alone.

Q. You never did?

A. I don't think so, I wasn't myself alone, my attorney was with me second time.

Q. Didn't you bring the books up there alone one time?      A. I bring the books once.

Q. Without your attorney? [285]

A. But he says I leave the books there, and then I leave the books, he wanted to check up the books.

Q. Weren't you asked by these Internal Revenue Agents to tell the sources of your income?

A. Something about the food—well, my attorney was with me——

Q. Just a moment. Mr. Barcott, didn't you tell the Internal Revenue Agents about your fish boat and about your income from that?

A. Oh, yes, that's——

Q. Well, where was that?

A. That was in—the first time.

(Testimony of John E. Barcott.)

Q. All right. Weren't you asked for other sources of income, what other sources of income that you had?

A. That's how I told them about the boat.

Q. Weren't you asked to give them all the sources of your income at the time that you——

A. Yeah, but I never give them any sources on that tip business, and something like that, I told them, I says, "I made a little money on the boat and some place else. Thats all there is." He never asked me very many question.

Q. You knew you were being investigated for income tax, didn't you? [286]

The Clerk: Plaintiff's Exhibit No. 19, for identification.

A. Not the first time, but after while, yeah, after.

Q. You are being handed what is marked for identification as Plaintiff's Exhibit No. 19. Will you tell the Court what that is, if you know?

A. I can't read that thing. I can't read that, no.

Q. You can't read it?

A. My glasses is no good. If you can, somebody else can, my attorneys read those things.

Q. You say you can't read them.

A. Not with these glasses, yeah.

Q. You have no other glasses?

A. No, I got no glasses with me, no.

Q. Well, do you have other glasses that you can read with?

A. Well, I got—I got glasses home.

Q. Your glasses are home that you read with.

A. That I read with.

(Testimony of John E. Barcott.)

Q. You didn't bring any glasses to Court that you can read with.

A. Well, that's—I never think of that.

(Whereupon paper was handed to Mr. Gagliardi.)

Mr. Gagliardi: We will object to that. We will object to the introduction of that exhibit, your Honor. I examined it and I think it highly improper——

Mr. Pomeroy: I have no objection to the Court seeing it and then——

Mr. Gagliardi: ——irrelevant and incompetent. In order for the record to be clear, we object, that the document is incompetent, irrelevant and immaterial, and not a proper issue in this case.

The Court: I think I shall have to sustain the objection at the present stage of the record. I——

Mr. Pomeroy: If the Court please, I may point out that the defendant—this is cross-examination, and the defendant on his direct examination said that he had volunteered all information to the—to the authorities and that—also that, as I recall it, that they didn't ask him what his sources of income were, that's why he never told them that.

The Court: Well, of course, this letter is dated in March. It is dated March 1946, and the first interview was in February or January of approximately '46. [283]

(Testimony of John E. Barcott.)

Mr. Pomeroy: That's correct. However, the time element continues to the present time because of the statement of the defendant that they never did ask him what his sources of income were. And here we have it——

The Court: I do not recall his testimony to that effect.

Mr. Pomeroy: Well, we'll ask now. Wasn't that his testimony?

Mr. Gagliardi: I didn't get the question. Mr. Reporter, will you read me the question?

The Court: You may ask him the question directly, again.

Mr. Pomeroy: Very well.

Q. Were you ever asked by the Internal Revenue authorities to state all of your sources of income?

A. What do you mean, state all of the sources of income.

Q. To state all the places where you obtained any money.

A. I don't remember that. I can't remember it at all.

Q. Would you say that they did not ask you?

A. Well, I can't remember those things, you know. I don't remember——

Q. Can you say that they did not ask you? [289]

A. Can I say they no ask me? They ask me some question there, but I can't tell you where, what——

(Testimony of John E. Barcott.)

Q. You don't know what they were. On your first meeting with Mr. Nielsen you went to your box in the National Bank of Washington, is that correct?

A. Yes, from the office, yeah.

Q. And there, Mr. Nielsen inventoried the contents of that box, is that correct?

A. What do you mean, inventory?

Q. He made a list of all of the contents of that box, isn't that right?

A. I think so, they was check all them business there.

Q. You showed him everything that was in that box.

A. He—yeah—he was there, he check up himself. He came up and check them.

Q. Why didn't you tell him about the other box at that time? The one down in the Washington Building.

A. He never ask me for anything any more.

Q. You didn't tell him about it either, did you?

A. Well, I never tell him anything, he never asked me anything.

Q. Why did you run right out to the other box after you left that place with Nielsen?

A. I no run up, I went to the place, when I left him I went [290] to the place. I got a policy with me and I went down to the box and put the policy in there. I never think——



(Testimony of John E. Barcott.)

Q. Didn't you tell this jury that when you went up to see Nielsen you didn't even have the key on you, you had no money on you. You went back to get a key and you found the money down there and then you took him up to the National Bank of Washington.

A. Oh no, just a minute.

Q. Now you say you say you have insurance policies on you, is that right?

A. I got the—when I left Mr. Nielsen I turned around, I went to the place, and they I got a couple of insurance policy I put in that box there, but after I left Mr. Nielsen, not before. And when I left Mr. Nielsen first time, I went to the—to my Oyster House, and get that twenty thousand dollars, one thousand bill with me, and I went down there meet him.

Q. And you thought you had ten thousand, but you had twenty thousand.

A. No, I knew there was twenty thousand there.

Q. Why were the two packages marked five thousand dollars each?

A. No, they was no marked, two packages, it was an envelope [291] there, envelope with this money, I didn't know if there was any receipt there on those packages.

Q. And weren't those envelope marked five thousand each?

A. I know why, there was one envelope that both of those went into.

(Testimony of John E. Barcott.)

Q. And wasn't it marked five thousand, on two bundles?

A. Well, I believe there was a slip there, I don't know what kind of slip there.

Q. Do you have that slip now? A. No sir.

Q. Where is it?

A. I don't know where is it.

Q. Well, you kept it, didn't you?

A. What slip?

Q. Yeah. A. Why do I want to keep a slip?

Q. Well, was it in your safe deposit box?

A. That was no bank slip or anything; if anything was there it was in the box. That I know——

Q. Is it still there? A. Huh?

Q. Is it still there? A. What? The slip?

Q. The slip. [292] A. No sir.

Q. Where is it now?

A. I don't know, I spend that money.

Q. You spent the money. A. Yeah.

Q. Twenty-one—twenty-three thousand?

A. Well, not whole business, but part of that money I spent.

Q. Then, Mr. Nielsen's testimony about you making an offer to him is not correct, is that right?

A. No sir, that's absolutely not true.

Q. That's absolutely not true? A. No sir.

Q. You made no offer to him whatever?

A. Nothing.

Q. It's not true. A. No sir.

Mr. Gagliardi: Well now, if your Honor please, he asked that question three times. I am objecting——

(Testimony of John E. Barcott.)

The Court: Objection will be overruled.

Q. Then you left there and went immediately to your other safe deposit box.

A. I passed by over there, and I went down there, I got a [293] policy in my pocket, coat pocket, and I went down there and put the policy there in that box.

Q. And you hadn't told Nielsen about the other box.

A. No, he never asked me for anything, I don't know nothing about it. He never asked me so many questions.

Q. Then did I understand you to tell the jury a little while ago that you didn't go back to the box in the basement of the Washington Building until February 13th, from January 28th, is that right?

A. I don't know I did—no, that was—I remember that that day I was in that box, and the slip is over there.

Q. What?

A. There is a slip over there show me—they show me that I was in that box that day.

Q. That day.      A. Yeah.

Q. That was the day that you went there with Nielsen, isn't that right?

A. What box, down below?

Q. You went to both boxes on the first day with Nielsen.      A. Yes.

Q. Then did you tell this jury that you did not go back to the basement of the Washington Building until February 13th when you went with Swanson and Nielsen? [294]      A. No, no—I told—

(Testimony of John E. Barcott.)

Mr. Ursich: Your Honor, it seems he is asking the witness to repeat what he has already told. If he has some matter he wishes——

The Court: Just make your objection, if you have one.

Mr. Ursich: Very well, if your Honor please. I object to the form of the question, on the grounds and for the reason that it indicates something which has already been answered.

The Court: Objection will be overruled.

Mr. Ursich: Thank you, your Honor, allow me an exception.

The Court: You have an exception to all adverse rulings.

Mr. Pomeroy: Will you read that question to the witness, please?

(Question read.)

Q. What is your answer to that question?

A. I was in that box, the slip will show that I was in that box after I left Nielsen.

Q. Then when did you next go back to that box?

A. I don't—I don't remember.

Q. You don't remember. [295]

A. No sir, I don't remember at all.

Q. You may have gone before you went back with Swanson and Nielsen.

A. When? I don't know, I don't remember.

Q. You went back there the next morning, didn't you?

A. I can't remember very sure if I was or not.

(Testimony of John E. Barcott.)

Q. Handing you Plaintiff's Exhibit No. 11, I'm asking you to look at the first, or top sheet, and read that to refresh your recollection.

A. That's my name, all right. That's my name.

Q. What date does it show on the back of that slip? No, the first sheet. The first sheet.

A. January 9 and—I mean, February, I think, that's what it is. Then, twenty-nine—I don't know, I can't read right with these glasses.

Q. Will you give it to me please? It reads January the 29th at two minutes after nine in the morning. That means that you signed this slip to get into that box in the Washington Building the next morning at nine o'clock, after you had been there the day before. Why did you go back there then?

A. If I went over there, I got lots of paper there, lots of stuff there in that box.

Q. Well, I thought you just kept your insurance policies [296] there.

A. If I went there—I got deed, we got the paper, I got the lease, and all that kind of a stuff there.

Q. Why did you go back again on this day?

A. I was—huh?

Q. What did you get on this day?

A. What I get on that day?

Q. Yeah.

A. Well, maybe I went to see some paper there, or something like that.

(Testimony of John E. Barcott.)

Q. You had been there at twelve forty-five p.m., just after you left Nielsen the day before and put some insurance policies in there, according to your testimony. A. Yes.

Q. What did you go back for the next morning at nine o'clock?

A. I got—what do you think, I got no business to go in that box? Who's going to stop me going in my box there? I can't—

Q. Nobody. We just want to know why you went.

A. Why, I got some paper there, all kinds of stuff there. I no went down there for money or anything else. I got no money.

Q. What papers did you go there for? [297]

A. I got some papers there, policy and paper, and lease, and all kinds of stuff.

Q. What papers did you go for—

A. Well, I can't tell you right—

Q. —on the morning of January 29th at nine o'clock?

A. What do you want to ask me for that—I got a bunch of that stuff there, in that box.

Mr. Pomeroy: That's all. No more questions.

The Court: Have you any re-direct?

Mr. Gagliardi: Yes, your Honor.

### Redirect Examination

By Mr. Gagliardi:

Q. Mr. Barcott, during the year 1943, what was the legal method that you had to run your restau-



(Testimony of John E. Barcott.)

rant? What was the condition upon which you had to run it? Did you have any rules or regulations from the government?

A. No sir.

Q. And what was the condition upon which you were permitted to run the restaurant?

A. Well, it's a point business it was there. [298]

Q. Point business. A. Yeah.

Q. And what was the condition of your bill-of-fare?

A. It was a pretty low bill-of-fare. The reason, frozen menu was there and it was pretty low bill-of-fare on that time.

Q. The menu was frozen? You mean to say—what do you mean by the “menu was frozen”?

A. By the government. We can't charge any more.

Q. You can't charge any more than a certain price. A. Yeah.

Q. And was that the same rule in 1944?

A. Yes.

Q. And what were the condition of your obtaining the needed supply or provision for your restaurant at that time, under this point of business?

A. I had awful time on that thing.

Q. What was—your main business in that place, what were they? Was it meat or fish?

A. Well, there was quite a bit of meat, and grease, lard, and the fish.

Q. Well, you call your place the California Oyster House. A. Yes, sir.

(Testimony of John E. Barcott.)

Q. Did you specialize in any particular food?

A. Yeah. [299]

Q. What kind of food did you specialize in?

A. I specialized steaks.

Q. And what else? A. Olympia oysters.

Q. And what was the price before your menu was frozen, for the Olympia oysters that you was purchasing? What was your cost?

A. I think they was around ninety cents an order.

Q. Ninety cents what?

A. Ninety cents order, ninety-five cents order average, the stew and the pan roast.

Q. No, no, you didn't understand my question. When you bought the Olympia oysters, what did you have to pay? By the quart or gallon.

A. I had to pay either quarts or gallon and it was about——

Q. How much did you pay before the war started?

A. It was about nine dollars, nine and a half dollars, something like that.

Q. And how much were they in 1943, after we got into the war?

A. They was, I think, fifteen, sixteen dollars or more.

Q. And in 1944?

A. They was more than that.

Q. Your price for oysters was frozen? You couldn't charge [300] any more than you were charging before the war?

(Testimony of John E. Barcott.)

A. Yeah, I can't charge any more, as my menu was frozen.

Q. Your menu was frozen. Was the cost of your oysters frozen? Was the Government freeze the oysters? Was there any ceiling price on them?

A. No sir, no, and lots of things beside.

Q. And what else was not—without a ceiling price? What other food?

A. There was—there was, I think, crab meat for a while there.

A. Crab meat?

A. Yeah, there was a ceiling price for a while, but they jumped up so high. When my menu was froze, I used to pay forty-five cents a pound.

Q. Yes.

A. And when the—the menu was frozen, but crab meat never was frozen, you know. They was raise the prices on it.

Q. And what did you have to pay afterwards?

A. That was ninety or a dollar a pound.

Q. And what was the condition of obtaining any oysters, were they easy or hard to get them?

A. Well, it was—if you fight for anything you can get it.

Q. What was the condition of obtaining the meat?

A. Meat, it was hard to get it. [301]

Q. Even though you had points?

A. Yeah, I had the point.

Q. Yes, but even though you had the point, it was hard to get?

A. You can't get it.

(Testimony of John E. Barcott.)

Q. Well, was the true also for 1945, up to the end of the war? A. Yes.

Q. And what about 1946, were condition the same?

A. I think so, it was yeah. If anything, it was better, we can get more food out of it.

Q. You could get food more—— A. Yeah.

Q. ——easily. A. Yeah.

Q. And in January and February then, of 1946, it was easier to obtain your supply?

A. More easy than it was before.

Q. Was the ceiling price still in effect?

A. I think so, that——

Q. Were the point still in effect at that time, or do you know?

A. Yeah, I think so, I don't know really, you know, that was—I don't know when it was out, really, you know. [302] I can't tell you sure. I went out of business in February, so I don't know what was the point.

Q. When did your son come back from the war? Anton.

A. I think he come back in 1946, I believe it was '46.

Q. Prior to January 1, 1946, or after?

A. He come in—he take the business about—right away, a month after he come back from the service.

Q. About a month after he come back from the service. A. I think so, month, yeah.

(Testimony of John E. Barcott.)

Q. And when did he take over the business?

A. He take—they close the place March 1st and do some work on it, make the bigger room, dining room, and put more table in there, and he open up March 1st.

Q. And did he do any work, or did he work in the restaurant prior to the time that you turned it over to him, if you know?

A. What do you mean?

Q. Did he come back to work in the restaurant before he took over the restaurant?

A. No, I don't think so. I don't——

Q. You don't remember.           A. Yeah.

Q. Now, in the house you say there are two stoves, you mean two cooking stoves, or—— [303]

A. No, one cooking stove, one heating stove was there.

Q. What kind of a heating stove?

A. I got oil heater.

Q. Oil heater?           A. Yes sir.

Q. Do you have any electric heaters in the house?

A. We got right now, it's about couple of years ago, something like that.

Q. But before that you had the——

A. No electric heater in the house that time, I had a oil stove.

Q. But you have electric heaters now?

A. Now.

Q. How many do you have?

A. I got two heating stoves, they cost thirty-five dollars apiece.

(Testimony of John E. Barcott.)

Q. Two heaters and a—electric range.

A. Yeah.

Q. In 1940, Plaintiff Exhibit 18, your return in 1940 shows a loss that you sustained during that year. Does that show also the expenses that you sustained in repairing and remodeling the place?

A. That's what it is there. You see, they put everything in one year, those repair bill. That's what I understood now, see there was put everything, they put depreciation, make depreciation for so many year, I [304] never lose money that year.

Q. But they put all of the repair in one year?

A. All the repair, the remodel that place 1940, they put in one year there.

Q. How much did it cost you to remodel the place? Approximately, not to the penny.

A. About four or five thousand dollars.

Q. How much?

A. About four of five thousand dollars.

Q. Four or five thousand dollars, and that's what shows the loss, the repair they were charging in one year?      A. Yeah.

Q. Who prepared this income tax report for the year 1944?      A. '44?

Q. In 1940.      A. That's Tom Ray did.

Q. And in items number 17 show rent and repair—      A. Yeah.

Q. —seven thousand, two hundred and five dollars and sixty-eight cents.

A. I think so.



(Testimony of John E. Barcott.)

Q. And who give that figure to Mr. Ray? Who give those figures to him?

A. He do the figuring himself.

Q. How much rent were you paying per month, per year, for [305] the place? How much rent?

A. How much rent in my business?

Q. Yeah, in 1940. Yes, how much rent were you paying in 1940?

A. I paid my share there.

Q. How much, how much was it?

A. Well, I took a lease, I don't know, I got a lease there for a hundred seventy-eight dollars a month.

Q. Yes?

A. I don't know how much rent there was, around eighty, ninety dollars, I think so.

Q. You mean you have a lease for more than your place?

A. For about three years from that time, yeah.

Q. I mean, did you have a lease for more than your restaurant? What else was included in your lease?

A. Oh, there was the cigar stand?

Q. The cigar stand?

A. And the barber shop, yeah.

Q. And the barber shop.

A. Yeah.

Q. And how much you was paying on the whole rent, how much was it for the both places?

A. A hundred seventy-five dollars, I think.

(Testimony of John E. Barcott.)

Q. A hundred and seventy-five dollars. And how much you [306] pay—how much did the other people pay you out of the hundred and seventy-five?

A. One was pay the fifty, and the other he was pay the thirty, something like that.

Q. And so your rent would have been about a hundred dollars a month?

A. Yeah, something like that.

Q. And the balance of the seven thousand, two hundred five dollars and sixty-eight cents was repair?

A. Yes.

Mr. Gagliardi: That's all.

#### Recross-Examination

By Mr. Pomeroy:

Q. Mr. Barcott, as a matter of fact in 1943, '44 and '45, the Army had a lot of men out here at Ft. Lewis, isn't that right?

A. That's right.

Q. The Navy had a lot of men around here, didn't they?

A. That's right.

Q. The shipyards were running full scale here in Tacoma.

A. Yes sir.

Q. In 1946 that wasn't true, was it? [307]

A. Huh?

Q. In 1946 that wasn't true, was it?

A. They was there too, I think.

Q. In 1946 were your shipyards running?

A. Well, I no say the shipyards, but there was—there was quite a bit bunch of people around here too just the same.

(Testimony of John E. Barcott.)

Q. But were there as many people around here in 1946 as there were in '45?

A. Well, you no—you can't figure that way——

Q. I just asked you the question. Were there as many people around?

A. There was quite a bit of people around here, and they eat in the restaurant on account of the food.

Mr. Pomeroy: That's all.

Mr. Gagliardi: That's all, Mr. Barcott.

(Witness excused.) [308]

## KATIE K. BARCOTT

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Gagliardi:

Q. State your name to the Court and jury, Mrs. Barcott. You sit down, please. Will you state your name to the Court and jury?

A. Katie Barcott.

Q. Katie Barcott?

A. Kate—K. K. Barcott.

Q. And you are the wife of John Barcott?

A. Yes, sir.

Q. How many children do you and John have?

A. We have two of our own.

Q. Two of your own, and did John have a child of his own?

A. Yes.

(Testimony of Katie K. Barcott.)

Q. What's his name? A. Anton Barcott.

Q. What's the name of your children?

A. John and Mary.

Q. And Mary. Where are they?

A. Mary is married and John is married.

They're both married. [309]

Q. They are both married. Do they live here in Tacoma? A. Yes, sir.

Q. When did you come to Tacoma, Mrs. Barcott?

A. Oh, about 1916.

Q. And prior to coming to Tacoma where were you? A. In Aberdeen.

Q. In Aberdeen. Were you married there, in Aberdeen? A. Yes.

Q. And what did you and your former husband do? What happened to you two?

A. Well, it was worrying with his trouble. We didn't get along all right.

Q. And was there a separation or a divorce?

A. It was divorce.

Q. When was that divorce made?

A. In 1915.

Q. 1915. In that divorce did you receive any money settlement from him? A. Yes, sir.

Q. Huh? A. Yes.

Q. How much?

A. Oh, about, close to four hundred dollars, it was something in there, I won't swear, because——

Q. How much?

A. Close to four thousand dollars.

(Testimony of Katie K. Barcott.)

Q. Close to four thousand dollars. And, after you divorced your husband in Aberdeen, you came to Tacoma, you say? A. Yes, sir.

Q. What did you do in Tacoma?

A. I was living with my father and mother.

Q. Yes?

A. And I was keeping a boarding house.

Q. Boarding house. A. Yes.

Q. Where was your boarding house?

A. In Old Town.

Q. Orting. A. Old Tacoma.

Q. Oh, Old Tacoma. And for how long did you keep that boarding house?

A. Oh, I was there till 19—1918.

Q. Until 1918. Well, did you make any money or lose any money on running the boarding house?

A. I didn't lose any; we was making a living there.

Q. And did you save any money from that?

A. Yes, sir.

Q. Then, what else did you do after that? [311]

A. I was working—let me think, Wheeler Osgood Door Factory.

Q. Wheeler Osgood Door Factory. What were you doing there?

A. I was working in the dry room. I was cleaning in the dry—kiln.

Q. How long did you work there?

A. Well, I worked there before I went away.

Q. And where did you go after you went away? Where did you go? A. I went to California.

(Testimony of Katie K. Barcott.)

Q. Where? A. Oakland, California.

Q. And what did you do over there?

A. I was working in a Pullman car.

Q. Huh? A. Pullman car.

Q. Pullman, what to do? A. Cleaning.

Q. And what else did you do in California besides that?

A. I was working in a cannery.

Q. And how did you work in the cannery, by——

A. Piece work.

Q. Piece work. A. Yes, sir. [312]

Q. How much did you earn while you was working in California?

A. There it was a good wages, I couldn't swear to it, but it was good wages.

Q. About how much?

A. You see it was—it was some day I was making more, all depends how I feel. If I feel like working faster, I make more; but I never did make less than about seven dollars or seven and a quarter, something on that order.

Q. And then did you come back to Tacoma?

A. Yes sir.

Q. When did you go to the California Oyster House? A. I started there in 1920.

Q. In 1920. And what did you do there?

A. What did I do there? Q. Yeah.

A. I was waiting the table.



(Testimony of Katie K. Barcott.)

Q. And what else, if anything?

A. And I was scrubbing, after I get through, clean the House after they close up the place I just clean up the House, we didn't have no janitors there.

Q. And what time would you go to work, in the day shift or night shift?

A. I worked nights. [313]

Q. You worked night shift. A. Yes sir.

Q. Who did take care of the day shift?

A. Who take care of day shift? Q. Yeah.

A. Well, Mr. Barcott sometime, he worked day-time and I worked nights.

Q. You were working nights. And between 1920 and 1926, did Mr. Barcott have any partner in the business?

A. I beg your pardon, I didn't understood that.

Q. I said between 1920 and 1926, did your husband have a partner in the business?

A. Yes sir.

Q. Who was he?

A. John Orb—that was his cousin.

Q. And were you being paid a wage while you was working there?

A. Yes sir, I—he was paying twenty-five dollars.

Q. Twenty-five dollars for what?

A. Twenty-five dollar working there, for waiting the table.

Q. Well, a day, or month, or week?

A. A day—I mean, a week, I beg your pardon.

Q. A week. [314] A. Yes sir.

(Testimony of Katie K. Barcott.)

Q. Your custom is weekly wages, is that it?

A. Yes sir.

Q. And twenty-five dollars a week.

A. Yes.

Q. And that—now, at the time that you and Mr. Barcott got married, did you have any money?

A. Yes, I had six thousand dollars, before I married Mr. Barcott.

Q. You had six thousand dollars.

A. Yes—oh, probably it might be a little—a few dollars less than six thousand, maybe it was more. I couldn't swear to that, but I know it had it.

Q. And where did you keep your money?

A. I keep it with me.

Q. Huh? A. I keep it with me.

Q. Where, with you? A. In a mattress.

Q. In the what?

A. In my mattress—under my mattress.

Q. Why didn't you put it in the bank?

A. Because I didn't believe in the banks. My folks didn't believe it, and I didn't believe it either.

Q. Why didn't you believe, didn't you trust the bank? A. No, I didn't trust the bank.

Q. Well, did you have—you say you had six thousand dollars. A. Yes sir.

Q. What did you do with that six thousand dollars?

A. After we got married I give it to my husband.

Q. And what did he do? Where did he put it?

A. Whatever he done with it, I never asked him.

(Testimony of Katie K. Barcott.)

Q. Well, what did he do with the money?

A. He used it in the business and he keep it with him.

Q. Well, where did he keep the money, do you know?      A. In the safe deposit box.

Q. In the safe deposit box.      A. Yes sir.

Q. And did all the money and profit that you was making go into the safe deposit box?

A. I imagine; I never asked him.

Q. Didn't you ever ask him?      A. No.

Q. Well,——

A. I trusted my husband. Whatever he done with it, I just trusted him with it.

Q. Well, didn't you know whether he went in there or not? [316]

A. When he went in there?

Q. Yes.      A. I don't know.

Q. You don't. Well, now during the time that you was acting as a waitress, up to 1926, you was receiving a wage.      A. Yes.

Q. Did you get any other money beside the wage?      A. Yes, I had tips.

Q. Tips.      A. Yes sir.

Q. In this California Oyster House, what kind of a meal do you serve? Do you serve lunches or special dinners, special——

A. We—well, it's more oysters and food like that, you know, it was more in seafood.

Q. More in seafood?      A. Yes, and steaks.

Q. And you said you received tips?

A. Yes sir.

(Testimony of Katie K. Barcott.)

Q. What was your daily average, tips that you would make?

A. My tips never was less than seven dollar, and always more than that.

Q. And how many hours would you work? [317]

A. I worked there eight hours—eight hours I work and lots of times when the—we have the help that is sick or something, and I work more hours in there. I stay pretty near two shifts lots of times.

Q. You stayed for two shifts?

A. Yes, many times. A fellow we had there that would work once in a while, he'd get drunk or something, and then I'd have to stay another shift.

Q. And after 1926, when your husband purchased his partner out, did he buy the partner's interest in the restaurant?      A. Yes.

Q. And after 1926, did you receive any more wage?      A. No, I didn't.

Q. And did you work in the restaurant?

A. Yes sir.

Q. Until when?      A. I worked till 1938.

Q. In 1938. And what was your average daily tips that you received?

A. I said one—not less than seven dollars. Always more, never less than seven, and it would be more, and Saturday especially. I was making from ten to twelve dollars and more than that.

Q. And what did you do with that money? [318]

A. I paid the home expenses, buy what I needed for the house——

(Testimony of Katie K. Barcott.)

Q. Who bought the furniture for the house?

A. I did.

Q. With what money?

A. With my money.

Q. You mean your money from the tips?

A. Yes sir.

Q. And who paid the running expenses of the house?

A. I paid the expenses in the house, and I didn't have very much expenses.

Q. How much would be your expenses, Mrs.—

A. It wouldn't be even fifty dollars.

Q. What was your mode of living, did you have any automobile?

A. No sir.

Q. Did you buy any jewelry?

A. No sir.

Q. Did you buy any silver?

A. No.

Q. What—how much furniture have you got in the house?

A. I buy furniture. I have a davenport, and we got a dining room set, and I gotta two rugs, and I got than since 1926. [319]

Q. How much did you pay for them?

A. I paid three hundred and fif—three hundred and twenty-five dollar for my davenport set.

Q. For what?

A. For my davenport.

Q. For dining room set.

A. Dining room set. Well, davenport and chair, how would you call that? That's what I call it.

Q. That davenport and chair?

A. Yes.

(Testimony of Katie K. Barcott.)

Q. And how much did you pay for that?

A. Three hundred and twenty-five dollars, when I get move in—when we move in the house, I buy that.

Q. You bought the house when? 1926?

A. 1926.

Q. And prior to that, where were you living?

A. Before that?

Q. Yeah.

A. I was living on Fawcett Avenue.

Q. Who did you live with?

A. Who I live with?

Q. Who, yeah.

A. Well, my mother was living with me, and my husband and kids, and I had roomers. [320]

Q. How many roomers did you have?

A. Oh, I had—sometime I had five, sometime I had six.

Q. How much the roomer would pay you?

A. Well, they never paid me less than three and a quarter—well, it all depends, you know, how—

Q. Three or four dollars a week, or day?

A. Yeah,—no, a week.

Q. A week?

A. They pay me—they would be—you see, the guys would sleep in the same room. It wasn't a very big house.

Q. Yes?

A. And we used to—they used to pay me about—you know, it's a long time ago, it's hard to tell you this.



(Testimony of Katie K. Barcott.)

Q. Well, was,—you——

A. They paid me the room there where they were staying, and it is so hard to tell and remember after so many years how much exactly it was. But I know that they—I used to wash clothes for them. I remember that, how much they paid me for that.

Q. How much did they pay you for that?

A. They paid me a dollar and a half a week.

Q. For washing their clothes.

A. For washing their clothes.

Q. Were these people countrymen of your people? [321] A. Yes.

Q. How did the income from their room rent and the washing of the clothes compare with the payment of the rent?

A. I always paid my rent with that, that's what I meant.

Q. With that you paid the rent of the house?

A. The rent. I never had to pay no rent for my house ever since I been married.

Q. And then in 1926 you say you purchased the house. A. Yes sir.

Q. Now, what were the expenses of running the home in the way of the children? You had three children there. A. Yes.

Q. Now what clothes did you buy the children?

A. I used to buy clothes at rummage sales till 1926 and 1928, they was cheap. I buy new shoes for fifteen cents, twenty-cent shoes, and coats for seventy-five cents, and make clothes over for my kids.

(Testimony of Katie K. Barcott.)

Q. Did you make it yourself?

A. Sure, I made over some for the kids. I hired sometime a woman, it wouldn't cost me—it was cheap, and I give it to the woman to make it for me. And I, for myself, I used to buy me clothes, I could buy me a nice coat for seventy-five cents, a dollar and a quarter. Even today I could go and get it, and I get it sometime now. [322]

Q. Now, did you buy any clothes for yourself——

A. Yes, I did.

Q. How often did you buy clothes for yourself?

A. Well, I buy for myself clothes when I needed them. It's five years I didn't buy nothing hardly. Just—just the last year.

Q. Did you buy any expensive coats at any time?

A. Yes, I buy me a fur coat and it cost me a hundred and sixty-five dollars.

Q. When was that you buy that?

A. That's eight years ago.

Q. Is that the only coat that you bought?

A. Yes, until nine—until a year ago.

Q. Until a year ago.

A. Until a year ago.

Q. And what did you buy last year?

A. I buy me another fur coat.

Q. How much did you pay for——

A. I was ashamed to wear that any more. I buy that one, and I pay three hundred and twenty-five dollars.

Q. And that's the most money that you spent, on your coat?

A. Yes sir.

(Testimony of Katie K. Barcott.)

Q. Prior to buying that fur coat, did you buy—what would be the price of all the—your clothes, what would be [323] the maximum you pay for them?

A. Well, I couldn't tell you. Sometime I buy me a dress that cost me eight—eight dollars, or six dollars, or ten dollars, that I'd buy me, but I didn't buy nothing for five years, ever (since war started, hardly anything, just the last year I buy me something.

Q. And did you buy anything during the time you was working in the restaurant, to amount to anything? A. Yes, I did.

Q. What did you buy?

A. Well, I buy me dresses and what I needed clothes.

Q. How much would you spend a year in clothes for yourself?

A. I couldn't tell you how much I spend.

Q. How much, more or less?

The Court: Mr. Gagliardi, we will have to get along. I have given you considerable latitude.

Q. Now, Mrs. Barcott, who else worked in the restaurant besides yourself?

A. Orb, my son, and my husband and I.

Q. When did your son come to work in the restaurant?

A. And the help too. I beg your pardon?

Q. When did your son begin to work in the restaurant? Came to work in the restaurant. [324]

(Testimony of Katie K. Barcott.)

A. Well, he came over here in 1925, and I think he started working two years after that, two or three years, something like that.

Q. And he worked until when?

A. He worked in—he's now, he's working, until he went in the Army.

Q. Well, prior to—did you pay him any wage for what he was doing?

A. I don't think my husband pay him any wages.

Q. Until when?

A. Till he started—till he got married.

Q. And when did he get married?

The Court: I think that's irrelevant.

A. 1934, I think.

Q. Then did the other son work in the restaurant?

A. Yes, he quit school, he didn't want to go to school, so——

Q. Did he get any pay for working in the restaurant?      A. No.

Q. What did you people do with the money that you make in the restaurant, all of you working in there?

A. Well, my husband was taking care of it.

Q. What was he doing?

A. He was taking care of the money. He just put it in the [E25] safe deposit and keep it there.

Q. And does your husband have any bad habits?

A. No sir. That was the funny part about it. I have to put up with the devil.

(Testimony of Katie K. Barcott.)

Q. Were the money that you were receiving from the tips sufficient to pay all your household goods, expenses and buy the clothes for yourself and children?

A. I give it to my husband.

Q. How's that?

A. I give it to my husband.

Q. Well, I asked you the question whether or not the money that you made out of your tips were sufficient or more than what you spent in running the house, buying clothes, and take care of the children.

A. I didn't quite get you there.

Q. I said, was the money that you received from the tips sufficient to pay the running expenses of the house and buy the children's clothes and your own?

A. Yes, I could—with that I could buy and I saved lots more on top of that.

Q. What did you do with what you saved? The excess——

A. The money that I saved? I give it to my husband.

Q. For what purpose?

A. Because I didn't need it, and I let him put it away. [326]

Q. Put it away.           A. Yes.

The Court: Any further direct examination?

Mr. Gagliardi: I think that's all, your Honor.

(Testimony of Katie K. Barcott.)

Cross-Examination

By Mr. Pomeroy:

Q. Did you take any trips during all this time you were married? A. Yes.

The Court: Were you through, Mr. Gagliardi?

Mr. Pomeroy: I thought he said he was through.

Mr. Gagliardi: Yes sir, yes, yes.

The Court: All right then.

Q. Where did you go?

A. I beg your pardon?

Q. Where did you go on your trips?

A. Where did I go on my trips? When?

Q. Have you gone on any trips?

A. Sure I went on trips. [327]

Q. Where? A. In Europe.

Q. To Europe. When did you go to Europe?

A. 1931.

Q. How long did you stay in Europe?

A. Just exactly hundred days.

Q. A hundred days. A. Yes sir.

Q. Did you ever take any other trips?

A. No sir.

Q. You've never been down to Aberdeen?

A. No sir. Oh, I've been in a car. My friends take me in a car.

Q. Your friends take you in a car.

A. Yes sir.

Q. How long did you stay there then?

A. How long did I stay? Just go for the trip and come back.



(Testimony of Katie K. Barcott.)

Q. Have you ever been down to California?

A. Oh, sure I've been to California.

Q. When?

A. Oh, let's see. When was the World Fair?

Q. You went down to visit the World Fair?

A. Yes. [328]

Mr. Pomeroy: That's all.

Redirect Examination

By Mr. Gagliardi: :

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Q. How much money did you spend in going to Europe? A. My—in Europe?

Q. Yes. How much——

A. Not very much, I'm telling you that much.

Q. How much? A. I don't know——

Q. Approximately.

A. Probably I don't believe it was more than—we figured, but it take me altogether I think it take about fifteen hundred dollars.

Q. Fifteen hundred dollars. A. Yes.

Q. How much money did you spend in going to the World Fair in California?

A. We didn't take anything only these friends take us in a car and we just paid for the expenses.

Q. How much were the expenses?

A. Well, I don't know, just what there was for the gas——

Q. Couldn't you give us an estimate?

A. I couldn't give you an estimate on that.

Q. Would a thousand dollars be—— [329]

A. Oh, no.

(Testimony of Katie K. Barcott.)

Mr. Pomeroy: She's answered it.

The Court: She answered. She can't give you any information.

Mr. Gagliardi: Well, I would just like to get the answer approximately.

That's all.

Mr. Pomeroy: That's all.

(Witness excused.)

### ANTON BARCOTT

produced as a witness on behalf of the Defendant, after being first duly 'sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Gagliardi:

Q. You may state your name to the Court and jury.      A. I beg your pardon?

Q. You may state your name to the Court and jury.      A. Anton Barcott.

Q. What relation are you to John Barcott? [330]

A. I didn't get that.

Q. What relation are you to John Barcott?

A. His son. His son.

Q. How old are you?      A. How old am I?

Q. Yeah.      A. Thirty-four.

Q. And what is your business?

A. I operate the restaurant at the present time.

(Testimony of Anton Barcott.)

Q. What's the name of the restaurant?

A. The California Oyster House.

Q. Where were you born?

A. In Yugoslavia.

Q. When did you come to the United States?

A. In 1925.

Q. After you come to the United States, what did you do?

A. I went to school for about a year and a half, and in the meantime I was working at the restaurant.

Q. What restaurant?

A. The California Oyster House.

Q. For whom?           A. My father.

Q. And after a year and a half, what did you do next? What did you do next, after the year and a half? [331]

A. I quit school and went down there to work steady.

Q. And how many hours a day would you work?

A. Oh, anywhere from ten to fourteen; fifteen.

Q. And what would you do there?

A. Well, I washed dishes and peeled potatoes and helped clean, until I learned how to cook.

Q. And then when you learned how to cook what did you do?           A. I took a shift over.

Q. And when did you start to work steady in the restaurant?

A. It was around 1927 or '28, I wouldn't—couldn't exactly state the date.

(Testimony of Anton Barcott.)

Q. Did your father pay you any wage or salary for your work?

A. Not until the time I got married.

Q. And when did you get married?

A. 1934.

Q. And before '34 what did your father give you?

A. I beg your pardon, that's not right. In 1933 I got married.

Q. And before that what wage, if anything, did your father give you?

A. He gave me fifteen dollars a week when I got married.

Q. Well, before that what did he give you?

A. Oh, he gave me about—he gave me about four bits a week [332] to go to a show once in a while.

Q. And——

A. And my car fare to get back and forth to work.

Q. Was there any other member of the family working in the restaurant at that time?

A. Yes, my mother worked.

Q. And who else?           A. And my dad.

Q. Anybody else?

A. Well, brother worked for awhile until he got old enough to work.

Q. When did he come to work there?

A. Oh, I—I don't exactly know the date.

Q. How old is your last brother?

A. He's approximately twenty-three or twenty-four, I couldn't tell you.

(Testimony of Anton Barcott.)

Q. I see. And he came to work when he got old enough to work?

A. That's right. He quit school and then came to work.

Q. Did he work under the same condition that you worked?      A. Yes.

Q. Without wage?      A. That's right.

Q. Is that the custom of your people? [332]

A. Huh, I presume.

Q. Now, after you got married, you received a salary?      A. Yes.

Q. How much?      A. Fifteen dollars a week.

Q. And you worked until when?

A. Until up to the time I went into the service.

Q. And you went into the service and then—when did you come back from the service?

A. I was discharged January 3, 1946.

Q. And when did you back to work in the restaurant, if anything?

A. Oh, it was the second day after I was home.

Q. The second day.      A. Yes.

Q. And what did you do there?

A. Well, I worked for about a month and dad says to, "I promised you the place," which I have been for years, and he says, "Go ahead and take it over, you and your brother." So he turned the place over to me. So I closed the establishment down and remodeled and redecorated and made it larger.

(Testimony of Anton Barcott.)

Q. Now, during the previous year when you come back from the service, you say you went back to the restaurant [334] right away? A couple days after?

A. Yes, about two days.

Q. Was there any rationing—

Mr. Gagliardi: I am going to—

The Court: Your client is leaving the courtroom. He can't.

Mr. Gagliardi: Pardon me, your Honor. I wasn't looking, but counsel should watch it.

Q. During the months of January, February, 1946, were there any point rationing to acquire any food for the restaurant?

A. Not at that time. I think it just happened to go off.

Q. And was anything rationed at all, if anything?

A. Sugar.

Q. Just sugar.

A. Uh-huh.

Q. And prior to the time you went into the service, you was working in the restaurant?

A. Yes.

Q. Was that run on point service?

A. Yes, it was at that time. [335]

Q. You had to have what, in order to buy the food?

A. This point system that the Government had out.

Q. And what was the method—what was the condition of the menu at that time, what happened to your menu?

A. The menu and price was ceiled.



(Testimony of Anton Barcott.)

Q. Ceiled. And—what do you mean “ceiled.”

A. Well, you could not charge any more than what the—oh, it’s complicated, sometimes you try to figure——

The Court: Well, let’s not go into that——

Q. We’ll not go into that. Was it a fixed price that you must charge?      A. That’s right.

Q. You couldn’t charge any more than what the Government said.      A. That’s right.

Q. How was the condition of obtaining food for the restaurant, supplies such as meat and fish, and—

A. Well, you’d buy, the Government would allow you so many points and you bought the food according to your points.

Q. Well, was it easier or harder to get?

A. It was hard to get.

Q. Now, how was it in January and February, 1946?      A. It was a little easier.

Q. Did you have to have any point at that time?

A. No.

Q. And could you get all the meat and supply that you wanted at that time?      A. Yes.

Q. What kind of a book your father was keeping in the restaurant when he was running the restaurant?

A. The book that is in evidence at the present time.

Q. Is that the only book that he ever had?

A. That’s the only one that I ever saw.

(Testimony of Anton Barcott.)

Q. Well, would you see it if he had any other book?

A. Well, he used to keep a little book for his check accounts.

Q. Well, showing you Exhibit No. 2, A-2, is that the little book?      A. Yes.

Q. And showing you Exhibit No. 1, A-1, Defendant's Exhibit No. A-1, is that the book that he kept to record all the cash transaction and disbursement?      A. Yes, it is.

Q. How was the cash register checked and handled?

A. Well, dad took the cash out and counted it in the mornings, when he came down. He used to get up five o'clock every morning. I don't think he ever missed one morning. [337]

Q. Five o'clock every morning. And how would the slips be checked? Would they be added and compared with the cash register?

A. No, uh-uh, he never had time for that.

Q. And who handled the cash register?

A. Most everybody.

Q. And who handled the slips?

A. Every body.

Q. You mean the waiters?

A. The waitresses, yes, they would give the customer a slip and it would be put on a stub at the cash register.

Q. And your father, you say, never checked them?

A. No, never—I never seen him once check them.

(Testimony of Anton Barcott.)

Q. How did your mother and father live at home? What kind of a—where did they get their food to eat at home?

A. Well, they used to haul it from the restaurant, most of it.

Q. And how—did you have any automobile all this time? A. No, sir.

Q. Did you have any—how did they live, expensively or meagerly?

A. I'm afraid not. They lived like poor people.

Q. And how were the clothes that your father and mother buy you and your other brother and sister? [338]

A. Well, when I was younger, he used to buy himself a pair of shoes and he would give me his shoes for my Sunday best.

Q. And—

A. That's been quite a while ago; that was when I first came to this country, and four, five or six years after I was in this country he would—

Q. And what your mother would do for the clothes for the other children?

A. Well, she'd make some of them and the rest of them she'd try to scrape them up as—anywhere she could.

Mr. Gagliardi: I think that's all. You may cross-examine.

Cross-Examination

By Mr. Pomeroy:

Q. When did you enlist in the Army?

A. I enlisted in March—no, May, 1944.

(Testimony of Anton Barcott.)

Q. In May, 1944.

A. It wasn't—I beg your pardon, it wasn't in the Army, it was in the Navy.

Q. You enlisted in the Navy in May, 1944. You were away from the restaurant then about a year and a half or a little better? [339]

A. Two years lacking one month.

Q. Didn't you return in January, 1946?

A. Uh-huh.

Q. When did you leave?

A. March of—May of 1944. It was—I was in service twenty-two months to be exact.

Q. Well, March or May, it was sometime——

A. I don't—I don't know the exact date. I couldn't tell you. My discharge papers will show it.

Q. You were twelve years old when you came to this country? A. Yes, sir.

Q. In 1925? A. '25.

Q. And who were you living with until you came to this country?

A. With my grandparents.

Q. And the Internal Revenue agents were checking this restaurant when you took it over, is that correct?

A. No, not when I took it over. They were checking before.

Q. They were checking during the month of February—— A. Yes.

Q. ——when you were in there, is that correct?

A. Uh-huh.

(Testimony of Anton Barcott.)

Q. When you were making arrangements to take it over? [340]      A. Yes.

Mr. Pomeroy: That's all.

Redirect Examination

By Mr. Gagliardi:

Q. You enlisted in the Navy voluntarily?

A. Yes.

Q. You was married and had children?

A. My father's consent.

Q. You were married at the time?

A. Yes.

Q. Did you have any children?

A. Yes, I had one.

Q. And your brother, when did your brother enlist?      A. Yes, he volunteered also.

Q. When did he go in the service?

A. Oh, I don't know. I think he went in a year or so sooner than I did.

Mr. Gagliardi: That's all.

(Witness excused.) [341]

JOHN PLANCICH

resumed the stand as a witness on behalf of the Defendant, was examined and testified as follows:

Direct Examination

By Mr. Gagliardi:

Q. What is your name? So we get it again.

A. John Plancich.

(Testimony of John Plancich.)

Q. You were a witness here yesterday?

A. Yes, sir.

Q. I believe you say you was some secretary of the Fishermen Packing Company?

A. General Manager and Secretary.

Q. And there was introduced here in evidence a contract wherein Mr. Barcott was released of this charge from four shares of stock in the corporation. Do you recall that?

A. Yes, I recall it. I wasn't on the stand when it was introduced.

Q. Yes, you was on the stand. Who were the shareholders of that corporation, how many there were in there?

A. In the company?

Q. Yeah.

A. There is approximately, it ranges from the various years, from I think a low of ninety-two up to a hundred. [342]

Q. And when this stock was purchased, what were the condition of purchase? Were they purchased on the installment plan, or were they purchased for cash?

A. Well, most of the stock issued was issued when the company was organized in the year of 1928 and '29.

Q. Yes.

A. Stock after that, I think there was very little original issue; it was all stock transfers.

Q. And those shares of stock, the company should receive the cash?



(Testimony of John Plancich.)

A. As I recall in reviewing some of the records, some of the stock was purchased by cash, others were stock subscriptions.

Q. When the corporation was organized, it was capitalized for a fixed amount?

A. A hundred and fifty thousand, I believe.

Q. A hundred and fifty thousand dollar. And someone had to subscribe under the law for that much stock, whether it was issued or not?

Mr. Pomeroy: If the Court please, I think that calls for a legal conclusion.

Mr. Gagliardi: No, I think if he knows it.

The Court: I don't know how he could say unless he was giving expert testimony. I don't see whether [343] it is relevant or not, whatever you have in mind, Mr. Gagliardi.

Q. Well, what was the reason you were cancelling this contract with Mr. Barcott, releasing him from buying eighteen shares and only allowed him to buy fourteen shares?

A. Well, there was—he had originally, the eighteen shares, as I recall it.

Q. Yeah.

A. However, there was—when I came, entered the employment of the company in 1935, on the records of the books there was a note outstanding against John Barcott for two hundred dollars. I believe; and that agreement that's attached to the cancelled stock in there is a settlement of that note and interest thereon as stated in the note.

(Testimony of John Plancieh.)

Q. Was that note for the payment of the shares of stock, or subscription of the stock?

A. That is something that I could not say. The note was—the notes were on the ledgers at the time I entered employment.

Q. Was there any other shareholder under the same condition?

A. Yes, there were quite a few. [344]

Q. Was the same cancellation took place?

A. On—in practically most of them they had turned to the point where I'll tell you—can I review it a little for——

Q. Yes.

A. —in detail? As far as the thing was concerned, the notes were about, generally, to become outlawed, so we gave the fellows that had the notes the privilege of paying up their notes, cancelling portions of their stock in payment of the note.

Q. Was the corporation making any profit those years, paying any dividend?

A. Most of the—no, they have not.

Q. When was the first time the corporation paid any dividend?

A. The corporation did not pay any dividend from 1930 until 1940.

Mr. Gagliardi: That's all.

#### Cross-Examination

By Mr. Pomeroy:

Q. But they paid it that year that he cancelled out the four shares, did they not?

A. How's that?

(Testimony of John Plancich.)

Q. They paid a dividend about the same time that he had [345] this note cancelled and the shares cancelled, isn't that correct?

A. Well, I would have to refer to the books. I think it was after the note was cancelled.

Q. Well, the note was cancelled in May—the 28th, and June the 10th they paid a dividend, isn't that correct?

A. I couldn't say without referring to the books.

Q. Yes? What do you mean?

A. I think there are records that will vouch for themselves there, speak for themselves the date of the dividend and the date of the cancellation.

Mr. Pomeroy: May I have the one sheet, the one underneath there.

Q. What date was the note cancelled?

A. Right—according to the stock record, it was on May 25th, '40. I don't know whether the agreement is signed prior to that or not.

Q. May 25, 1940. That shows the cancellation of the note? A. On the stock record, yeah.

Q. All right. Now, what other record do you have to have to show the dividend that's paid and when you paid it?

A. I think that was recorded there yesterday. I would have to have the minute book.

Q. The minute book? Is this the minute book?

A. No, the minute book was taken out. They took——

(Testimony of John Plancich.)

Q. Oh, it was removed. Well, let's get it. You don't recall that it was June the 10th?

A. I believe it was in June.

Mr. Pomeroy: That's all.

Mr. Gagliardi: That's all.

(Witness excused.)

### ANTON SURYAN

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Gagliardi:

Q. You may state your name, please.

A. Anton Suryan.

Q. How do you spell the last name?

A. S-u-r-y-a-n.

Q. And what relation are you to John Barcott?

A. Brother-in-law. I married his sister.

Q. And did you have any agreement with him during the year [347] 1946 concerning loaning of any money?

A. Yes, sir.

Q. What was the agreement?

A. I was asking him to loan me about fifteen thousand dollars. I figure to build a boat.

Q. To build a boat? A. Yes, sir.

Q. What is your business? A. Fisherman.

Q. Fisherman. How long you been a fisherman? A. All my life.

(Testimony of Anton Suryan.)

Q. And you was going to build a boat for the purpose of fishing?       A. Yes.

The Court: What year was that?

Mr. Gagliardi: What year was—'46, your Honor.  
In 1946——

The Court: Yes.

A. No, I meant—that was 1945.

Q. Yeah, you asked him in 1945.

A. '45. Yes, sir.

Q. And when did you intend to build the boat?

A. I figure to build boat right here in Tacoma.

Q. When? What year?

A. Right in the beginning 1946.

Q. '46. And what would the boat cost you to build?

A. John Barcott asked me that it was going to cost around forty thousand dollars.

Q. It would cost around forty thousand dollars.

A. Yes, sir.

Q. And you asked Mr. Barcott to loan you around fifteen thousand.

A. Ten to fifteen thousand dollars, yes.

Mr. Gagliardi: You may cross-examine.

### Cross-Examination

By Mr. Pomeroy:

Q. When did you ask him for the loan of this money?       A. 1945.

Q. When?

A. Right after the 4th. That was sometime in September.

(Testimony of Anton Suryan.)

Q. September, 1945. A. '45, yes, sir.

Q. Did you build a boat? A. No, sir. [349]

Q. Why not?

A. I buy—I figure it was gonna cost me too much money, so I decided to buy a boat. Old boat I got now.

Q. Did you buy a boat then? A. Yes, sir.

Q. When did you buy the boat?

A. I bought it the same year.

Q. 1945? A. 1945, yes, sir.

Q. What time in 1945?

A. I don't really remember. Right after the—  
after the Christmas.

Q. Right after Christmas in 1945.

A. Yes.

Mr. Pomeroy: That's all.

### Redirect Examination

By Mr. Gagliardi:

Q. Was it '45 or '46, which was the year you took over ownership? What year did you buy the boat? What year did you buy the boat?

A. 1945.

Q. How many years ago was that? [350]

A. Pardon me, 1946, the beginning.

Q. Yeah, that's what I'm trying to get.

A. Yeah.

Q. And what month of the year did you buy?

A. That was in February.

Q. And how many years ago was that year that you bought the boat?



(Testimony of Anton Suryan.)

A. Well, it's two years. We only had it two years, two seasons.

Q. Uh-huh, two season. That's all you had, two seasons with that boat? A. Yes.

Q. 19—the season of '46 and the season of '47.

A. Forty-six, forty-seven, yes, sir.

Mr. Gagliardi: That's all.

Recross-Examination

By Mr. Pomeroy:

Q. Why didn't you—why did you say “right after Christmas”? A. After—pardon me?

Q. Why did you answer the question, “right after Christmas”?

A. Well, I answer right after Christmas, that's when we had the boat, right after Christmas.

Q. That's February, is it? [351] A. Yes.

Mr. Pomeroy: That's all.

Mr. Gagliardi: That's all.

(Witness excused.)

MRS. PEARL McCORD

produced as a witness on behalf of Defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gagliardi:

Q. You may state your name to the Court and jury, Mrs. McCord.

A. Mrs. Pearl McCord.

(Testimony of Mrs. Pearl McCord.)

Q. Pearl McCord? Where do you live?

A. 812 South Junett, Tacoma, Washington.

Mr. Pomeroy: I didn't get it.

The Witness: 812 South Junett, Tacoma, Washington.

Mr. Pomeroy: How do you spell that?

The Witness: J-u-n-e-t-t. [352]

Q. And your—do you have a family?

A. Yes, I do.

Q. How many children have you?

A. I have one now.

Q. How many children had you?

A. Pardon?

Q. How many children did you have?

A. Two

Q. You say—what happened to the other?

A. He was killed in the war.

Q. What business are you in? What do you do for a living? A. Pardon?

Q. What do you do for a living?

A. I'm a waitress at the California Oyster House.

Q. You work in the California Oyster House. How long you been working there?

A. Since 1929.

Q. In what capacity? A. Waitress.

Q. Are you still working there now?

A. Yes, sir.

Q. Who else—was Mrs. Barcott working at the California Oyster House at the time you went to work there?

A. When I first went to work there, yes. [353]

(Testimony of Mrs. Pearl McCord.)

Q. And how long did she work there?

A. I wouldn't state the exact number of years because I don't remember.

Q. Approximately, eight or ten years?

A. I would say that would be right.

Q. And what was she doing over there, Mrs. McCord?

A. She was a waitress when I was there.

Q. What else would she do?

A. Clean and whatever was to be done after the place was closed.

Q. Well, what shift did she take care of?

A. The night shift, with me.

Q. And the California Oyster House—anybody else in the family of Mr. Barcott work there?

A. Anton Barcott and Johnny Barcott.

Q. All work there? A. Yes.

Q. Now, you're—been there since 1928?

A. '29.

Q. '29. That's something like eighteen years?

A. About that.

Q. And during the time that you worked there who handled the cash register?

A. Whoever was nearest the cash register. [354]

Q. And would Mr. Barcott ever check the slips?

A. Not to my knowledge, no.

Q. Did you ever see him check anything?

A. No.

Q. Now, in regard to tips, did you receive tips from that restaurant? A. Pardon?

(Testimony of Mrs. Pearl McCord.)

Q. Did you get any tips as a waitress in that restaurant? A. Yes.

Q. Did Mrs. Barcott get tips?

A. Well, I presume. I never checked on my fellow-workers.

Q. What was your average tip that you received per day, the average amount?

A. That would be very hard to say. They varied.

Q. But, what would be the smallest and the biggest?

A. I would state the exact number. I don't remember over that period of years.

Q. Well, give us an approximate amount, please.

A. Well, that's hard to say, I can't——

Q. Would you say five dollars was the least or the most?

A. ——remember eighteen years back what I received in tips.

Q. No, no, not eighteen years. I mean between——

Mr. Pomeroy: Well, I'll object to this, if the Court please. She's a willing witness, she's [355] answered three or four times, and while he's giving the figures to her——

The Court: I think, of course, if she could make an estimate, that would be helpful.

Mr. Gagliardi: Evidently she misunderstood the question.

Q. I didn't mean in just 1928 and '29; I mean the period of time you've been there, what's the average daily——

A. Well, are you referring to the three years, or before?

(Testimony of Mrs. Pearl McCord.)

Mr. Pomeroy: I'll object to that—just a moment. Just a moment. I'll object to that, if the Court please, on the ground that she's been there up to the present time. She's been with Barcott since 1928 or some such date——

The Witness: '29.

Mr. Pomeroy: '29. Mrs. Barcott hasn't been there since 1938, and what her daily tips may be, an average over the period of time would not be relevant in this case.

The Court: The witness can make her estimate of what they were before 1938. [356]

Q. What were the daily tips prior to 1938?

A. My tips from the time I went until '38?

Q. Yes. Not for every year, but prior to 1938, what were the average?

A. I don't like to state figures, because——

Q. Approximately, you don't have to be exact——

Mr. Pomeroy: I'll object to that, if the Court please. She's answered that. I object to any further questioning along this line.

The Court: That was before '38.

Q. Have you any fixed amount that was the minimum that you received?

Mr. Pomeroy: If the Court please, I'll object at this time to anything since 1938, because the best evidence that you can construe——

The Court: Oh, it might have some evidentiary value. It will probably be '38, subsequent, but if she wants to make an estimate, she may. [357]

(Testimony of Mrs. Pearl McCord.)

Q. Can you give us the minimum figure that you received?

A. Well, I would say this, it's not a fact, what I mean is I wouldn't swear to it, three dollars would be low and five would be average.

Q. Average. A. That's me.

Q. For you. A. That's right.

Mr. Gagliardi: That's all.

Mr. Pomeroy: No questions.

(Witness excused.)

## ROBERT E. BIRCH

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Gagliardi:

Q. You may state your name to the Court and jury.

A. Robert E. Birch. B-i-r-c-h. [358]

Q. Mr. Birch, what is your profession or occupation?

A. I'm a Certified Public Accountant.

Q. And where is your place of business?

A. Fidelity Building.

Q. Are you licensed by the State of Washington as such public accountant?

A. Yes, I have a C.P.A. license in the state.



(Testimony of Robert E. Birch.)

Q. At the request of Mr. Barcott did you make an audit, or a—an auditing of his assets?

A. Yes, I made an examination of them.

Q. Made an examination of all of the assets and also—will you please present the statement that you made? When did you make this auditing and make the report, Mr. Birch?

A. Well, we've been doing this work for about a week now.

Q. This last week?

A. Yes, that report was made——

The Clerk: Defendant's Exhibit A-3, for identification.

Q. Showing you Defendant's Exhibit A-3, for identification, I ask you if you made auditing of Mr. Barcott's assets and liabilities and for what year. What year did that cover?

A. This report covers the years 1919 through 1945. [359]

Q. Inclusive? A. Inclusive.

Q. And this report, where did you get your source of information?

A. If I may read from this report here——

Q. No, you have to testify.

A. We verified various bank deposits; in other words, savings accounts at the various banks and Saving and Loan Association; we examined the bonds listed according to serial numbers, date of purchase, and so forth; some of the information was obtained from Mr. Barcott in regard to his real estate and other information; as for the dates purchased, we didn't examine those.

(Testimony of Robert E. Birch.)

Q. And information as to the original capital, where did you get that information?

A. From Mr. Barcott.

Q. And information concerning additional asset acquired during the period, where did you get that information?

A. From Mr. Barcott.

Q. And did you examine any other sources upon which you may arrive the maximum income that Mr. Barcott would have received during the period of 1919 to 1945, both date inclusive, in which he had to pay no income tax, or if he did pay an income tax, what amount of income [360] tax did he pay?

A. Well, we examined his book, cash book there, for the years, well, the complete years of '44 and '45 that you have in exhibit there.

Q. Just a minute.

Mr. Gagliardi: If your Honor please, may I ask, the defendant has to leave and he can't hold himself any longer, I ask the Court's indulgence.

The Court: How many more witnesses do you have?

Mr. Gagliardi: I have just two more, your Honor. We can't finish tonight, I'm sure.

The Court: Have you any other witnesses?

Mr. Gagliardi: We have this gentleman here, and another witness—and then there is the character witness, so we couldn't finish it tonight.

The Court: Three of them?

Mr. Ursich: If your Honor please, if you wish them tonight, I'll have to call them right now.

(Testimony of Robert E. Birch.)

The Court: Well, it is after adjourning time, but you desire to adjourn? [361]

Mr. Gagliardi: It is only ten minutes.

The Court: How long will it take for this witness?

Mr. Gagliardi: This is an accountant to go into these figures of twenty-five or twenty-seven years.

The Court: I told the jurors that I did not expect to keep them at work on Saturday, and I am rather anxious to make good on my word, but there is a case set for Monday, a non-jury case. I think I shall have to continue that case over until Tuesday, because if we work tomorrow you would have to work rather late to complete this case with the argument and the Court's charge, and so I think I shall adjourn this case over until Monday morning and allow the jurors to go home and report back here on Monday.

Now then, over this long adjournment I want you to bear in mind particularly the admonitions and instructions I gave you at the outset of this case. It has gone along for two days. If you are not careful you may talk to some of the people at home about the case. That you must not do. They may ask you to—what kind of a case you are on. You can say you are on an income tax case, but beyond that you should not go. Do [362] not express any opinion and do not allow anybody to express an opinion to you, and then we can be sure that your verdict will reflect one in keeping with the law. Now, you are excused.

(Whereupon, adjournment was taken until 10:00 o'clock a.m., November 3, 1947.)

November 3, 1947, 10:35 o'Clock A.M.

The Court: You may proceed now.

Mr. Gagliardi: If it please your Honor, the last witness we had on the witness stand was Mr. Birch, the Certified Public Accountant. We hadn't gone very far with him. I have a few short witnesses that I would like to call first and dismiss them, and then we will proceed with the accountant, which will take a little longer time, if your Honor will permit me to call them out of order.

The Court: Are there any objections?

Mr. Pomeroy: No objections.

The Court: Proceed:

### MARIE DASCHER

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Ursich:

Q. Will you state your name to the Court and jury, please? A. Marie Dascher. [364]

Q. How do you spell that last name?

A. D-a-s-c-h-e-r.

Q. Where do you live, Mrs. Dascher?

A. 3626 South Monroe.

(Testimony of Marie Dascher.)

Q. I'll ask you whether or not you were ever employed by John Barcott at the California Oyster House?      A. Yes, I was.

Q. When did you go to work there?

A. The first part of '28 till the first part of '31.

Q. First part of 1928——      A. Yes.

Q. ——till the first part of '31. In what capacity were you employed there?      A. A waitress.

Q. As a waitress?      A. Uh-huh.

Q. During the time that you were employed there, do you know of your own knowledge whether or not Mrs. Barcott was employed there?

A. Yes, I remember very distinctly, because at that particular time I was working at another establishment and Mr. Barcott came over and asked me if I would work for him—come and work for him. He said that I would better myself as I would be more than doubling my wages in tips, and——

Q. Go ahead.      A. That's all.

Q. So you did go to work for Mr. Barcott?

A. So I gave it a thought and then finally decided to go. He told me his wife was working there and that's why he knew that. So I did work there, and I was working with Mrs. Barcott.

Q. Do you have any recollection about how much you received in tips during that time?

A. Well, when I first went there, I was working on the morning shift and Mrs. Barcott was working on the night. And I was making from four to five on the day shift. Then, we alternated, every two weeks we would alternate. I would take the

(Testimony of Marie Dascher.)

night shift, which was Mrs. Barcott's at that particular time. Then I was making from seven, sometimes ten, and I have made the week-ends on twelve——

Q. As——

A. Uh-huh, but on the night shift.

Q. Would you say then that you are able to express an opinion that seven dollars would be a fair average that you received daily?

A. I think so. I think it was pretty good there.

Q. And [366]——

A. It was pretty good, I thought.

Q. ——all during that time that you worked there, Mrs. Barcott was employed?

A. Yes, then she would do other work besides, if she wasn't working.

Q. She'd do other work?           A. Yes.

Q. Like janitor work?

A. Janitor—I've seen her mop many times.

Q. How did the tips in the California Oyster House compare with the previous restaurant you were working in?

A. Well, where—the place I left, I wasn't making more than a dollar a day, and when I heard that, that was kind of attractive to me because I had—I was a widow and I had two children and it meant that I didn't have to worry about existing after I went over there. That's how I remember so distinctly.

Q. There actually was that difference?

A. Yes, there was.



(Testimony of Marie Dascher.)

Cross-Examination

By Mr. Pomeroy:

Q. Mrs. Dascher, you have known Mrs. Barcott and Mr. Barcott for about twenty years, isn't that right? [367]

A. '28 was the first—1928.

Q. And you've seen them during those periods, the last twenty years?

A. Oh, yes, I've been in there off and on, all the time.

Q. You were quite friendly with them?

A. Well, I—I've known them and always been friendly, even though I haven't worked there.

Q. You have always been friendly with them.

A. Always been friendly, I never visit them to a great extent.

Q. Now, Mrs. Dascher, what work was Mrs. Barcott doing during this period of time that you were in there?

A. Well, she—as I said, she relieved the girls and would do a lot of janitor work in the back. I can remember that.

Q. Did she do any cooking?

A. And she really——

Q. Did she do any cooking?

A. Well, I couldn't say about that.

Q. You don't remember.

A. Of course, I wasn't there continually, you know.

(Testimony of Marie Dascher.)

Q. You don't remember that.

A. No, I can't remember that, no.

Q. Would you say—— [368]

A. I couldn't say "yes" or "no."

Q. Would you say that she didn't do any cooking?  
A. Well, I couldn't say.

Q. You don't remember. Was she there all during the time that you were there?

A. Yes, quite, very—very much so.

Q. Did she go away on any trips while you were there?  
A. No, not that I know of.

Q. Did she go to Europe for a trip?

A. Not that I——

Q. You don't know if she ever went or not?

A. I don't know anything about it.

Q. You don't know if she——

A. No, I was gone. I was in California.

Q. Oh, is that so? When did you leave?

A. Oh, I left in the latter part of '31. I was down there for fourteen——

Q. That was when you quit the California Oyster House, was when you went there?

A. Yes, that's when I went to California.

Q. And how long were you in California.

A. Fourteen months.

Q. And then did you come back to Tacoma?

A. Yes, I—I came back to run a place of my own. [369]

Q. Oh, I see.

A. And—but that wasn't in town.

(Testimony of Marie Dascher.)

Q. And did you run a place of your own?

A. Well, with another woman, on the Gig Harbor Ferry.

Q. You worked on the Gig Harbor Ferry. And how long were you employed there?

A. Two years.

Q. Then where did you work?

A. Well, I—oh, I had a little grocery store of my own. I went on my own after that, more or less.

Q. How much did you earn on the Gig Harbor Ferry?

Mr. Ursich: I submit, your Honor, that's improper. It has no basis of comparison.

The Court: Objection will be overruled.

A. Oh, I—I was in partnership with this woman.

Q. How much did you earn while you were on the Gig Harbor Ferry?

A. Oh, I couldn't say exactly.

Q. Did you earn fifteen dollars a day?

A. Oh, no, to begin with there was two of us and we would split it, I wouldn't know exactly, it may be more than that.

Q. What did you do in California when you were down there fourteen months? [370]

A. Oh, I was—didn't do anything for about six months, and then I was clerking down there.

Q. What was the reason for you leaving the job at the California Oyster House?

A. Because I—oh, I wanted to go down to my mother's sister in California.

Mr. Ursich: I object—

A. I wanted to go down there.

(Testimony of Marie Dascher.)

Q. You wanted to go down and visit your mother's sister?

A. Well, I wanted to go down there and move, really.

Q. You wanted to go down there and move?

A. Uh-huh.

Q. Did you work in California?

A. Yes, I worked after——

Q. As a waitress?

A. No, I didn't work as a waitress down there.

Q. You didn't work as a waitress.

A. Just clerked here and there.

Q. How much salary were you getting from Mr. Barcott when you worked there?

A. Three dollars.

Q. Three dollars a day? And about seven dollars—— A. That was——

Q. That's ten dollars a day all together you earned, is [371] that right? A. Well, yes——

Q. You earned ten dollars a day all the time you were there?

A. Yes. Well, I figured—that is an average. I figure maybe it would run about that.

Q. Well, an average of ten dollars a day.

A. Yes, yes.

Q. And how many days a week did you work?

A. Oh, some five—five days a week, that is, I'd work overtime, too, when some of the other girls wouldn't work. That's why that averaged that way.

(Testimony of Marie Dascher.)

Q. Oh, you worked overtime.

A. Well, when somebody else didn't show up, or something like that.

Q. How many days a week did you work?

A. Five or six.

Q. Five or six, which was it?

A. Five and six, both.

Q. And you were making about sixty dollars a week?

A. Well, of course I couldn't remember exactly how——

Q. Well, isn't that your testimony here?

A. Yes, yes, yes, yes, that's it. I say, if I was working, sure. [372]

Q. Some days you made fifteen or twenty dollars, is that right? A. Oh, no, not twenty dollars.

Q. Fifteen dollars?

A. Oh, I said I made three, and then I'd make in the day shift I'd make four, five and six; and then at the night shift I would alternate every two weeks, it would be a couple of dollars more, that is, off and on.

Q. Didn't you testify that you got as high as twelve dollars a day in tips?

A. I did—that would be once in a while, I said.

Q. And then on that day, with your three dollars salary, you'd make fifteen dollars a day.

A. Yes, but that wasn't all the time, but it was—on a week-end, like on a Saturday perhaps.

(Testimony of Marie Dascher.)

Q. And you were very grateful for this job, as you say, because Mr. Barcott gave you a chance to support your children.

A. Yes. That did help me out, because I was a widow and I had my two children and it helped me to exist.

Q. But sixty dollars a week, and then you quit and went to California.

A. Yes, I lost my boy after that and I was upset and I went away.

Q. When did you lose your boy, Mrs. Dascher?

A. Oh,——

Mr. Ursich: I object, if your Honor—that's immaterial.

The Court: Objection is overruled.

A. Well, I lost my boy in the last part of '29.

Q. The last part of '29, but you stayed on about two years more.

A. Yeah, but I went to—yes, I did. My mother moved away, so I went down there after her.

Q. So you were making sixty dollars a week and then you quit and went to California.

A. Well, yes, I don't know whether I was making sixty, or somewheres around, pretty good anyway. I couldn't say definitely.

Mr. Pomeroy: That's all.

Mr. Ursich: That's all, Mrs.——

(Witness excused.) [374]



ROBERT B. KNEGO

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ursich:

Q. Will you state your name, please?

A. Robert B. Knego.

Q. Where do you live, Mr. Knego?

A. 3637 South Ainsworth.

Q. What is your business, Mr. Knego?

A. I have no business, I am a cook by trade.

Q. You are a cook by trade. A. Yes, sir.

Q. You are not working now?

A. Not at the present time.

Q. Calling your attention to on or about the 22nd day of January, 1945, I'll ask you whether or not you borrowed any money from John Barcott?

A. 1945?

Q. Yes.

A. There must be some mistake, because it was '43.

Q. 1943? A. Correct.

Q. And what was that for? [375]

A. Well, my wife got—in the hospital and I was forced to get out of home, and I went to Mr. Barcott and asked him if he lend me from five to seven hundred dollars. I had a little money of my own, and I went to work for the Air Force, Pacific Oversea Air Force, and I was making a little money and I had a few bonds and I cashed in, and

(Testimony of Robert B. Knego.)

Mr. Barcott say, "Sure, I'll let you have the five hundred or seven hundred dollars, whatever you want."

Q. And did he lend you the money?

A. Yes sir.

Q. Did you give him any security for that money?

A. No sir, he took the mortgage on the property till I paid him up.

Q. He took the mortgage on the property.

A. Yes sir.

Q. And did you finally pay him?

A. Everything's paid off and property is turned over to me.

Q. When did you pay him, do you remember?

A. I think it was 1945 or something like that, I paid it all up, and——

Q. You paid him all up.

A. All—paid him all up.

Q. Did he—you were the owner of Lots 19 and 20 in Block 8633, is that the property? [376]

A. That's the property.

Q. That's the property you gave a mortgage to him for? A. Yes sir.

Q. Did you ever pay him any interest on that loan? A. No sir.

Q. Or anything——

A. I asked him if he want it, and he said he didn't want it, so I didn't pay him nothing.

Q. In other words, you paid him the loan back——

(Testimony of Robert B. Knego.)

A. I paid him all the loan, but then I asked him if he wants any interest on it he refused it, so I didn't pay him any.

Q. Then he cleared the title to your——

A. Cleared the title, and I went to court and cleared everything on my name.

Q. And that was all there was to it.

A. That's all there was to it.

Mr. Ursich: That's all.

Cross-Examination

By Mr. Pomeroy:

Q. Who is Edward L. Pallies?

A. Pallies? That's the man that used to own the property. [377]

Q. Did he own it before you did?

A. Yes sir.

Q. Well, he's the one that gave the deed to Mr. Barcott, didn't he?

A. Well, his widow give him the deed, because he died before, so there was probaton going you know, they had some kids and it had to be probated, so it took quite a time till it was probated, and my attorney had it all fixed up and we both, we—Mr. Barcott paid the money for it and then after I paid him, then the property was turned over to me.

Q. Oh, I see. You were buying it from Pallies, and then——

A. Yeah, that's it.

Q. ——you borrowed some money from Barcott and Pallies gave the deed to Barcott, and then when you paid him Barcott gave you the deed.

(Testimony of Robert B. Knego.)

A. Correct.

Q. How much money did you borrow?

A. Well, between five or seven hundred dollars, I'm not——

Q. Between five and seven hundred dollars, and how much——

A. Yes.

Q. ——how much did you pay him back?

A. Paid him the same amount as much as I borrowed.

Q. How much does this paper say 'you paid him? [378]

A. Oh, I don't see very good. Wait till I get my glasses. Oh, what does that say? One thousand dollars.

Mr. Pomeroy: That's all.

A. That's include,— I give Barcott some money before—before I——

Mr. Pomeroy: That's all.

A. ——before it was——

Mr. Ursich: Oh, let him answer. Let him explain.

Mr. Pomeroy: You can ask him a question if you want. He answered me.

### Redirect Examination

By Mr. Ursich:

Q. Did you pay him a thousand dollars, Mr. Knego?

A. Paid him a thousand dollars—I give him a, I think it was five or six or whatever it was, what

(Testimony of Robert B. Knego.)

money I had when I cashed in the bonds and what little cash I had——

Q. Uh-huhm.

A. ——then I give it to him and Mr. Barcott say when the deed and everything is set up in the court, he says, “You let the attorney come down there” and I give him the cash, he says, “You ain’t got no time, let him come down here,” [379] and I give him the money and everything was okeh then.

Q. Well, was it a thousand dollars, or do you remember?

A. That’s all the property was worth, a thousand dollars.

Q. Well, what I want to know is this then, did you give Mr. Barcott any premium for the use of his money at all?

A. Did I give him any premium?

Q. Any interest or anything like that.

A. No sir, no interest whatever I give.

Q. In other words, you gave him back the same amount he gave you?

A. Same amount that he gave me.

Mr. Ursich: That’s all.

Mr. Pomeroy: That’s all.

(Witness excused.)

## ROBERT E. BIRCH

resumed the stand for further examination and testified as follows:

## Direct Examination

By Mr. Gagliardi:

Q. Mr. Birch, I believe we were examining you when we stopped Friday afternoon, if you recall, you was—showing you Defendant identification A-3, I ask you if that's the report, financial report that you prepared [380] for Mr. Barcott?

A. That's correct.

Q. Mr. Birch, in preparing that financial report, from what dates did you begin to find the assets and the earning of Mr. Barcott, what period of time did that cover?

A. We started with the years 1919 through 1945.

Q. And during that time, did you itemize the asset of Mr. Barcott from year to year?

A. That is correct.

Q. And did you then itemize and calculate the earning of Mr. Barcott from year to year?

A. That is correct.

Q. What basis did you have to ascertain the earning of Mr. Barcott from year to year, what basis did you use, what method?

A. Well, we went on the basis that he could have earned a maximum amount allowable under income tax laws without paying any income tax for certain years. The years that he did pay the tax, we added the amount of tax, we figured the income on that and added that to that.



(Testimony of Robert E. Birch.)

Q. You have examined the law and also the records concerning the maximum amount a person could earn during each year between 1919 to 1945, inclusive, in which he had no tax to pay? [381]

A. Yes, we got a list from the Collector's office in Tacoma.

Q. And from that then, did you start in, in preparing the assets of Mr. Barcott from year to year?

A. That is correct.

Q. In ascertaining the value of his asset, did you then total from time to time?

A. That's right.

Q. Now starting with the year 1919, you start—that's the first year you start on this report, on page three of the report—page two, or page three, which is it?

A. Exhibit 2 concerns the earning by the business and so forth.

Q. And page number three, which you marked exhibit three, but it's page number three, as a matter of fact, that starts with what?

A. Exhibit three starts out with his living expenses for the various years, and we determined his non-deductible expenses.

Q. Now, in starting the business in 1919, what capital did you take into consideration that Mr. Barcott had when he started out in business?

A. Five thousand dollars.

Q. And did you carry that capital as a capital asset in the [382] beginning of the business?

A. Yes, we carried that until 1926, when an additional fifteen hundred dollars was added into that.

(Testimony of Robert E. Birch.)

Q. And in 19——

Mr. Pomeroy: Pardon me, are you still talking about Exhibit No. 3?

Mr. Gagliardi: I am talking about identification number two, and I am talking about exhibit number 1. It starts from one. I want to get to three, afterwards.

Q. In taking the capital investment, or the capital asset of Mr. Barcott, he had at the beginning of the period in 1919, you say—did you calculate was five thousand dollars? A. That's right.

Q. Anything was added to that capital in the year—any later years?

A. In 1926 there was an additional fifteen hundred dollars added.

Q. Where that fifteen hundred dollars was derived from?

A. That was the additional amount that he paid to buy out his partner.

Q. To buy out his partner. Now, did you then add anything more in a later year, concerning other sources of capital, that was not earned in the business? [383]

A. What do you mean by that, please?

Q. Any additional money that come into the possession of Mr. and Mrs. Barcott.

A. Yes, there was—there was twenty-five hundred dollars from accident proceeds. That was in 1931, I believe it was counted as additional capital.

Q. 1931 was twenty-five hundred dollars, the proceed of the death of Mrs. Barcott mother.

A. That is correct.

(Testimony of Robert E. Birch.)

Q. Did you take any other capital asset other than the earning of the business, or the possible earning of the business?

A. We took Mrs. Barcott's earnings.

Q. Your—we come to that, Mr. Birch. I want—under—if you know—did you take in consideration in figuring this statement whether or not Mrs. Barcott had any money of her own when she married Mr. Barcott? A. No, we did not.

Q. And did Mr. Barcott—did Mrs. Barcott have six thousand dollars when she married Mr. Barcott, that is not included in this report?

A. No, it is not included in this report?

Q. And then the total asset of Mr. Barcott and Mrs. Barcott at the end of the period would be six thousand dollar [384] more than you actually calculated, is that true?

A. There could be assumed there was six thousand dollars more.

Q. Now, beginning from the year 1919, what earning did you allocate Mr. Barcott earned that year? A. 1919?

Q. Yes.

A. We assumed he earned a thousand dollars.

Q. Was that the maximum that he could earn without paying any income tax? A. Yes.

Q. And what did you allocate as his living expenses? At that time he was not married.

A. Seven hundred and fifty dollars.

Q. And what did you leave as the net proceed of his business?

(Testimony of Robert E. Birch.)

A. The net was two hundred and fifty dollars.

Q. What page are you using now, sir—two, three, or one?—or what you call it.

A. This is on exhibit two.

Q. Exhibit two. And what earning did you then assume that Mr. Barcott had for the years 1920 and each year thereafter, until 1945?

A. Well, the earnings by the business, I have first, was [385] 1920, thirty-two hundred dollars; 1921, fifty-six hundred; 1922, eight thousand; 1923, ten thousand, four hundred; and 1924, thirteen thousand, two hundred; '25, seventeen thousand, nine hundred; 1926—

Q. Well, you mean those are added together?

A. That's right, this is cumulative.

Q. Accumulative.

A. No, I didn't have them as individuals, no.

Q. Yeah. Well, then, each year you added—what did you add to the beginning of the period? Each year.

A. What do you mean by each year?

Q. Well, the total accumulated increase, what did you add to it? The amount which was exempt from taxation?

A. Well, we added in there the—well, for example now, in 1921, the total accumulated earnings in the business was fifty-six hundred.

Q. What period did that cover?

A. Well, that was for 1919 to 1921.

Q. Well, then you add each year a certain amount, is that it? A. That's right.

(Testimony of Robert E. Birch.)

Q. And this amount that you add, what was it? That's the maximum amount that would be allowed by law without taxes? [386] A. That's right.

Q. Yeah. Have you figured year by year how much each year he should have earned, without adding to the total amount? I don't know whether I make myself clear or not.

A. In other words, you want to know what the maximum amount was that he could have earned without paying any income tax on it.

Q. Yes, for each year. A. That's right.

Q. Per year.

A. Yes, I have this in a schedule here, in my work papers.

Q. You have the schedule, and is that the amount which you add to the total each year?

A. That is correct.

Q. So then, this statement that you have prepared carries the amount which was allowed to be exempt from law. A. That's right.

Q. And those years he paid the taxes, did you figure the amount of tax that he paid, and did you figure the amount that he earned that year?

A. That's right.

Q. Now, each of these year, you have you say, accumulative, accumulating from year to year. [387]

A. That's right.

Q. What was the total earning of Mr. Barcott's business from January 1st, from 1919 to January 1st of 1946, the total amount of earning on the business alone? Without the investment.

(Testimony of Robert E. Birch.)

A. It could have been a hundred and thirty thousand, two thirty-seven, fifty-three.

Q. And what was Mrs. Barcott, assuming that Mrs. Barcott received, did you now in this statement figure the earning of Mrs. Barcott as tips she received? A. That's right.

Q. And what period did you cover on these tips?

A. That was from the years 1920 through 1935, a total of sixteen years we took into consideration.

Q. And that is '35, inclusive?

A. That's right.

Q. If Mrs. Barcott then stopped working in the restaurant in 1938, there would be three additional year to add to that? Would it?

A. Through '38, it would be three additional years added to that.

Q. What was the amount of Mrs. Barcott earning during that period, of you say twenty years, or nineteen years?

A. We took it on a basis of sixteen years. [388]

Q. Sixteen years.

A. There has been a total of thirty-six thousand dollars.

Q. And what was the total amount then, between the two earning, the earning of the business and Mrs. Barcott as her own individual tips, without considering any wages she was paid?

A. For the full time 1919 through——

Q. Yeah. A. ——1945?

Q. Yes.

A. That would be a hundred and sixty-six thou-



(Testimony of Robert E. Birch.)

sand, two hundred and thirty-seven dollars and fifty-three cents.

Q. Now, in figuring that amount then, did you add the original investment which Mr. Barcott had when he started business and the additional twenty-five hundred dollars which he put in when Mrs. Barcott mother was killed?

A. Added that to what?

Q. To the earning of the business and the earning of Mrs. Barcott. What was the total amount which Mr. Barcott handled during that period? How much was it?

A. It would be a hundred and seventy-three thousand, seven hundred and thirty-seven, fifty-three. [389]

Q. Now, going back to their living expenses, have you calculated the living expenses of Mr. and Mrs. Barcott during that period?

A. That is correct.

Q. Have you set it out by year, and where can we find it in this report? A. Well——

Q. What page?

A. On exhibit two—exhibit three, it gives the living expenses by years.

Q. Now, will you allow us—tell the jury what living expenses you allowed Mr. Barcott when he was unmarried.

A. Seven hundred and fifty dollars a year.

Q. And you took that out from the thousand dollar which you assumed that he earned?

A. That's right.

(Testimony of Robert E. Birch.)

Q. And what living expenses did you allow then up to the time when Mr. Barcott got married? The same amount? A. That's right.

Q. And what living expenses did you incur in 1922, the first year that Mr. and Mrs. Barcott were legally married? A. A thousand dollars.

Q. And what did you allow in 1923? [390]

A. Fifteen hundred dollars.

Q. And what did you allow each year thereafter, until 1930?

A. Fifteen hundred dollars a year.

Q. And what did you allow in 1931?

A. Three thousand dollars.

Q. Three thousand dollars for 1931.

A. That is correct.

Q. What was the extra amount in 1931?

A. That was the trip to Europe. We figure on a basis of about fifteen hundred dollars was spent.

Q. That was the trip they took to Europe, and you allowed then—— A. That's right.

Q. ——the three thousand dollars. And what expenses did you allow then for 1932 to 1941—'40, inclusive?

A. 1932 through 1940. It was twelve hundred dollars.

Q. Huh? A. Twelve hundred dollars.

Q. And then from 1941 to 1945, what did you allow in 1941? A. Twelve hundred dollars.

Q. And why is the amount here is more than twelve hundred? I see here it is fourteen hundred and thirty-five, eighty-two. What did that include?

(Testimony of Robert E. Birch.)

A. Well, there was some taxes involved, and that was some addition amount that was added in. In other words, those were non-deductible cash expenses.

Q. Non-deductible, and that was the income tax that was paid.

A. That is correct.

Q. Then those two amounts represent, if I understand you right, the allowance you allow them for living expenses and then what tax they paid.

A. That's correct.

Q. But as living expenses, you figure there were only twelve hundred dollars.

A. That is correct.

Q. Now I see here in 1942 you allow five thousand, three hundred and ninety-one, fifty-four. Out of that is twelve hundred dollars for expenses, the other is tax?

A. No, that five thousand three ninety-one, fifty-four represents the increase in net worth. In other words,——

Q. Oh, I got the wrong page.

A. Well, that's on exhibit two, but your in——

Q. Yeah.

A. ——column there.

Q. Now in 1942 it was two thousand, five hundred and ninety-one. [392]

A. That's correct.

Q. Yeah, and then in 1943 it was nineteen hundred and eighty-four and some cents.

A. That's correct.

(Testimony of Robert E. Birch.)

Q. So the difference in 1945 was four thousand, eight hundred and sixty-six.

A. In 1945 it was four thousand, eight hundred and sixty-six, seventy-two.

Q. And that year, in the same exhibit, is showing the amount of tax paid for each year.

A. That is correct.

Q. Now, in 1940 there is an item here of five thousand, five hundred and twenty-one dollars and sixty-eight cents. What that represent?

A. Well, the majority of that represents capital expenses, or an expenditure that was charged off to expense during the year that should have been capitalized as depreciated.

Q. What was the expenditure? What purpose was it?

A. Oh, I believe it was for remodeling of the restaurant and so forth.

Q. And you say it was improperly charged off——

A. Well, at that time, I understand, it was charged directly on to expense.

Q. And it should not have been charged off as expense. [393]

A. No——

Q. It were a capital investment?

A. Well, it was added to his fixed assets that he had there, but it should have been depreciated over a period of so many years.

Q. I see. Instead of taking it all in one year.

A. That is correct.

Q. Well, did you examine the report of 1945——

(Testimony of Robert E. Birch.)

'40, of Mr. Barcott? Have you examined his report, as to whether or not he deducted that as an expense?

A. I saw a copy of the tax filed by another accountant—certified public accountant.

Q. And that shows it was deducted as expenses. Now, will you tell the jury, Mr. Birch, what was Mr. Barcott—strike that, please.

In adding up his assets, did you examine his holding, what asset he has?

A. Well, we examined the bank—we obtained a list of the time of certificate of deposits the bank had, the National Bank of Washington, for the years 1937 through 1943; we examined his U. S. Savings Bonds, series D, E, and G; we went down to his safe deposit box, we hadn't examined that, and obtained the amounts to the issue dates of the various years. Those were for the years [394] 1940 through 1945. His U. S. Bonds, series B, the information was obtained from a tax file of another firm of accountants here in town. We examined the savings account at the Pacific First Federal Savings and Loan. That ran from 1930 through 1945. The Alpha Corporation was from 1935 to 1945. The savings account at the National Bank of Washington was examined, that was from 1937 to 1945. The savings account at the Tacoma Savings and Loan Association was examined from 1927—I believe that was closed out in 1931. The boat "Ranger," the cost of that was obtained from Mr. Barcott. The real estate contract, that was for his son Anton, was

(Testimony of Robert E. Birch.)

examined, that was for the years 1937 to 1945. Conditional sales contract with his son Anton was examined from 1937 through 1945. The investment in the California Oyster House, the information was obtained from Mr. Barcott.

His residence cost was determined in 1926 come nearly being thirty-three hundred dollars. He paid premiums on his insurance policies——

Q. That is life insurance policies?

A. That is correct.

Q. How much was the premium?

A. Well, we took the premium of two hundred and sixty dollars [395] a year, is what was given to us. I understand it might have been two thirty, but the small amount of difference there, doesn't amount to too much. The Fisherman Packing Corporation stock, that was given to us at fourteen hundred dollars.

Q. Now in determining then, each year, what Mr. Barcott had as asset, what page do we find in this report? Where are they listed?

A. Where he had a total asset——

Q. Yes.

A. ——each year? That would be on exhibit one.

Q. Exhibit one of the identification A-3. Will you tell the jury how the asset either changed or increased during that period. How do they find it in this report? If they examined it themselves. Explain it to them.

A. Well, in 1919—do you want his net worth or just——



(Testimony of Robert E. Birch.)

Q. Yeah, the net worth each year.

A. All right. In 1919 the net worth increased two hundred and fifty dollars. In 1920, it increased thirty-seven hundred dollars, that's over 1919.

Q. In that increase does that take in consideration the tips of Mrs. Barcott, or does it not, which?

A. In 1920?

Q. Yeah. 1921, and 1920.

A. Yes, it starts with 1920, it does take into consideration. [396]

Q. In consideration. All right, go ahead now.

A. In 1921 the increase was thirty-nine hundred; in 1922 it was thirty-six fifty—this is year by year, not cumulative.

Q. Yeah, year by year.

A. In 1923 it was thirty-one fifty; 1924 it was thirty-five fifty; and 1925 it was fifty-four fifty; '26, '27 and '28 it was all the same; 1929 it increased to seventy-eight fifty-one, ninety-three; 1930 it was fifty-four fifty.

Q. In 1929, was that the year that he paid a tax?

A. That is correct.

Q. And that you take the amount from his record? A. That was included.

Q. The amount that he paid on taxes.

A. That's right. In 1930 it was fifty-four fifty; '31 it was six thousand fifty dollars; and in 1932 it was forty-three fifty; and '33 and '34 and '35 it was the same; '36 was twenty-five thirteen, seventy-five; in '37 there was a loss of eight 0 eight, eighty-one—

(Testimony of Robert E. Birch.)

Q. What was the loss?

A. Well, the loss was more or less the loss of his boat sale.

Q. Of his boat sale. A. That's right. [397]

Q. How much was the loss on that boat sale?

A. That was figured at three thousand dollars.

Q. Three thousand dollars. Go ahead.

A. And twenty-three forty-six, seventy-one was in '38; '39 was twenty-one hundred; and '40 it was thirty-five ninety-six; '41 was twenty-eight forty-seven, forty-nine; and '42 was fifty-two ninety-one, fifty-four; '43, eleven thousand five 0 one, thirty-two; '44, eighty-four twenty-seven, twenty-three; and '45 it was ninety-five ninety-one, twenty-three.

Q. You deducted the losses on that boat from his capital asset? A. That's correct.

Q. Now, will you give us his total net worth by year, as cumulative? Starting from 1920 to 1919 without the five thousand.

A. All right. In 1919 it was fifty-two fifty—these are consecutive years, I won't read the years—

Q. Yes.

A. Eighty-nine fifty, that's eight thousand nine hundred and fifty dollars; twelve thousand eight hundred and fifty dollars; sixteen thousand five hundred dollars; nineteen thousand six hundred and fifty dollars; twenty three thousand two hundred dollars; twenty-eight [398] thousand six hundred and fifty dollars; thirty-four thousand one hundred dollars; thirty-nine thousand five hundred and fifty

(Testimony of Robert E. Birch.)

dollars; forty-five thousand; fifty-two, eight fifty-one, ninety-three; fifty-eight, three 0 one, ninety-three; sixty-four, three fifty-one, ninety-three; sixty-eight, seven 0 one, ninety-three; seventy-three, 0 fifty-one, ninety-three; seventy-seven, four 0 one, ninety-three; eighty-one, seven fifty-one, ninety-three; eighty-four, two sixty-five, sixty-eight; eighty-three, four fifty-six, eighty-seven; eighty-five, eight 0 three, fifty-eight; eighty-seven, nine 0 three, fifty-eight; ninety-one, four ninety-four, eighteen; ninety-four, three forty-one, sixty-seven; ninety-nine seven thirty-three, twenty-one; and 1943 it was a hundred and eleven thousand, two thirty-four, fifty-three; '44 it was a hundred and nineteen, six sixty-one, seventy-six; and '45 it was a hundred and twenty-nine thousand two hundred and fifty-two dollars and ninety-nine cents.

Q. What was it at the end of the year 1942?

A. At the end of nineteen hundred and forty-two it was ninety-nine thousand, seven thirty-three, twenty-one.

Q. And that was his net worth at that time?

A. That's right.

Q. After you deducted all the living expenses. Is that true? [399]

A. That is correct.

Q. And now——

The Court: Why don't you carry that through '43—or '44 and '45?

Q. What was it in 1944, at the end of the year 1944?

A. It was a hundred and nineteen thousand, six sixty-one, seventy-six.

(Testimony of Robert E. Birch.)

Q. And at the end of the year 1945?

A. A hundred and twenty-nine thousand, two fifty-two, ninety-nine.

Q. Now, have you checked the number of bond and the amount of United States bond that Mr. Barcott has?

A. We did on the series D, E and G.

Q. Well, did he have any other bond?

A. He had some series B bonds.

Q. When were they purchased?

A. Well, they were purchased in 1936.

Q. '36. And the total amount of bond, how much did he have? What become of the 1936 bond, the series B? A. Those were cashed.

Q. When were they cashed?

A. I believe in 1946. [400]

Q. '46. That didn't include in this report. In 1945, then, how many United States bond did he have? '45, at the end of 1945.

A. At the end of '45 he had seventy-eight thousand, four hundred and fifty dollars.

Q. In United States bond. In adding all his asset, what other property did you take in consideration when you consider the value of it, did you take his home in consideration?

A. Yes, his home was taken into consideration.

Q. How much you take the home in the amount of the investment in the home?

A. In the home we have thirty-three hundred dollars.

(Testimony of Robert E. Birch.)

Q. Thirty-three hundred dollars, is that the amount that he paid for the home?

A. That's what he told to us, yes.

Q. And if he spent about three thousand dollar in remodeling and repair, then his asset would depreciate—decrease to the extent of three thousand dollars? Is that true?

A. Yes, if it was valued at more than that now, it would increase his assets.

Q. If he spent three thousand dollars in remodeling the house, then you didn't take that in consideration? A. No. [401]

Q. Now did you take in consideration any other asset that he had beside the United States Saving Bond and the house, did he have any cash on hand at that time that you took in consideration?

A. Well, we worked out a cash—a possible cash accumulation during the period.

Q. And as the cash accumulated, did the bond decreased or increased?

A. Well, in 1943 when he bought quite a few bonds, the cash decreased, and in '44 it decreased, too.

Q. How much the cash decreased in 1943? To what extent?

A. Around ten thousand dollars.

Q. Ten thousand dollars, and was that represented by increasing in the value of the bond or the number of bonds?

A. Well, he purchased more bonds during that time out of cash.

(Testimony of Robert E. Birch.)

Q. And as the cash decreased then, the bond increased, is that it?      A. That is correct.

Q. Where do we find that in this report, this right——

A. Well, I think you will find that on exhibit one.

Q. Exhibit one. You're carrying it as cash and as securities?

A. Well, we've got cash accumulated during the period. [402]

Q. Well, how much cash would we have in 1941, at the end of '41, we say?

A. Well, '41 it was sixty-two—sixty-two thousand, eight fifty-four, fifty-four.

Q. Was that all cash, or would it include other items which we had, which we——

A. No, that was possible cash, it could be——

Q. Possible cash. And in the last of December 1942, how much possible cash we had?

A. It was sixty-two thousand, five hundred and sixty-five, seventy-nine.

Q. And in the last of December 1943, how much cash did he have—possible cash?

A. Fifty-two thousand, nine hundred and eleven dollars.

Q. And how much bond did have——

A. Thirty-one thousand.

Q. How much?

A. Thirty-one thousand dollars.

Q. Thirty-one thousand.

A. Well, thirty-four thousand, four hundred and fifty, all together.



(Testimony of Robert E. Birch.)

Q. And in the year 1944, then what was the cash, possible cash?

A. Forty thousand, nine hundred and thirty-nine dollars and [403] seventy-six cents.

Q. And how much bond?

A. All together he had fifty-eight thousand, four hundred and fifty dollars.

Q. And at the end of 1945, he had how much cash?

A. Well, we discovered it to be thirty thousand, one sixty-six, forty-two.

Q. And bond, seventy-eight thousand, as you testified.

A. That is right.

Mr. Gagliardi: Now, if your Honor please, we offer that identification number two—that A-3 in evidence. That's been properly now——

The Court: Are there any objections?

Mr. Pomeroy: Yes, I'll object on the grounds it is improper, irrelevant and immaterial and self-serving. He's testified as to what his opinion is as to how much he had, it's in evidence now.

Mr. Gagliardi: If your Honor please, it seems to me an auditor's report is always admissible in this kind of a case. He is an expert witness on the matter.

The Court: It will depend on the data. If he used documentary data for the compilation of the report, it would be competent. If he used information [404] from the accused, it would be self-serving and would fall under the self-serving rule.

(Testimony of Robert E. Birch.)

Mr. Gagliardi: That would be true if it was made by the defendant.

The Court: But, it is made by an employee of the defendant.

Mr. Gagliardi: It is the same basis which the Government used. We took the same position the Government used—took the same theory on the same basis, which we adopted.

The Court: No objection to this witness testifying as he has in detail on what the net worth was as he found it in the beginning of '42 and '43, and each year thereafter, as here involved. That is, upon the basis on which they rest their claim that there was an evasion of tax due. This witness has covered it, but covered it in much greater detail. There would be no objection to that, but the document itself. I will have to sustain the objection and allow you an exception.

It is time now for the morning intermission, so I think we will take a recess of fifteen minutes. The audience will remain seated until the jury pass out.

(Whereupon, the jury retired from the courtroom.) [405]

The Court: Now, how much longer will you——

Mr. Gagliardi: I think we are about finished. That is the last.

The Court: You indicated that you probably would call some character witnesses.

Mr. Gagliardi: I told Mr. Ursich in this case it is worthless.

(Testimony of Robert E. Birch.)

The Court: Well, the Court cannot advise you on that.

Mr. Gagliardi: I know, your Honor.

The Court: The Court will be at recess then for fifteen minutes.

(Recess.) [406]

Q. Mr. Birch, in calculating this income and expenditure, did you use the same method that the Government agent, Mr. Swanson, testified that he used too?

A. Yes, it's primarily the same.

Q. And why is there difference between the total amount that you arrive at and the total amount that Mr. Swanson arrived at? What——

A. Well, the primary difference between the two of them is due to the fact that we attempted to show in here the accumulation of cash over a period of years. In other words, the Government's report, I believe, contends that the cash at the end of '42, was twenty-three thousand dollars, and at the end of '45 it was twenty-three thousand dollars. Well, this report of ours shows that it would have been possible to build up perhaps a cash of sixty-two thousand dollars. I think the primary——

Q. Did you take in consideration any other source of income which was not reported for income tax purposes, which Mr. Swanson did not take in consideration?

A. Yes, we—Mrs. Barcott's earnings were not taken into consideration.

(Testimony of Robert E. Birch.)

Q. The Mrs. Barcott earning then is added to your total? A. That's right. [407]

Q. And that is not added to the total of Mr. Swanson? A. I don't believe it is, no.

Q. And that is the main difference between you two? A. That's right.

Mr. Gagliardi: You may cross examine.

### Cross-Examination

By Mr. Pomeroy:

Q. Mr. Birch, how long have you been a certified public accountant?

A. Since May of '46.

Q. That's a little over a year, is that right?

A. That's right.

Q. And you prepared this statement last Thursday? A. That is correct.

Q. And——

A. That was typed at that time.

Q. Well, how long did it take you to figure this out?

A. Well, I had been working on it for about a week.

Q. About a week. In other words, just this last week, why you worked on it. And in this statement yourself, you state that the information that you built this statement up on was obtained from Mr. Barcott, isn't that correct?

A. That is correct. [408]

Q. You didn't certify to any of these things that he told you? A. No, I did not.

(Testimony of Robert E. Birch.)

Q. It was impossible for you to.

A. That is correct.

Q. There were no sales slips or cash register slips or anything like that, that you could check?

A. Not or those years at all, no.

Q. And the amount of money that Mrs. Barcott received in tips was told to you, is that correct?

A. That is correct.

Q. And you don't certify to those amounts?

A. No, we do not.

Q. And the amount of earnings in the business were told to you by Mr. Barcott?

A. Not for those years. We went on the basis of the maximum amount allowable without paying any income tax.

Q. In other words, you took the figures of the maximum amount of money that he could have earned——

A. Without paying any income tax.

Q. ——without paying any income tax.

A. That is correct.

Q. And you have kept that as one figure all the way through and added to it, that's what you are talking about, isn't it? [409]

A. That is correct.

Q. Did Mr. Barcott tell you that he saved every cent that he made during all those years?

A. No, he didn't come out and actually tell us that. We talked to him several times in regard to figures that we had here.

(Testimony of Robert E. Birch.)

Q. Well, the figures that you have here would indicate on a cash basis, that he had saved every——

A. That is correct, we inferred that.

Q. In other words, he hadn't spent a cent for anything.

A. Outside of living expenses.

Q. Well, outside of the living expenses.

A. That is correct.

Q. Now you added a figure here of thirty-three hundred dollars as the cost of the residence, is that right?

A. That is correct.

Q. And that figure was told to you by John Barcott?

A. That is correct.

Q. Now, on your item number one, exhibit number one, did you deduct that amount from your net worth, from the earnings, or where did you get the thirty-three hundred dollars to buy the home with?

A. Well, that was reduced in the cash. In other words, any adjustments that would have come through during the years [410] would have been a cash adjustment.

Q. You did reduce it, is that correct?

A. That is right.

Q. In 1926, referring to Exhibit number two, his earnings and what you figured he had on hand was twenty-two thousand, six hundred dollars, is that correct?

A. What was that again, please? '26?

Q. 1926. At the end of 1926, your figures show that he had on hand twenty-two thousand, six hundred dollars, is that correct?

A. Twenty-four thousand, three hundred.



(Testimony of Robert E. Birch.)

Q. Well, I'll refer you to exhibit number two, in the year 1926.

A. That was his earnings by the business.

Q. And that would be the amount of cash——

A. Well, accumulation, that's right.

Q. That's what he had accumulated out of the business. And what year was it that he—that was a half interest in the business, wasn't it?

A. At that time, I believe it was, yes.

Q. What did he tell you about his partner at that time? A. In what way do you mean?

Q. Did he have a partner after 1926?

A. I really don't remember. I don't recall whether he had [411] it singly or not.

Q. Well, did he make the same amount of money, did he tell you, before 1926 as he made after 1926, when he bought out his partner?

A. He didn't tell us exactly how much money he made. He didn't remember how much he made.

Q. He didn't remember how much he made.

A. No.

Q. Did he tell you that he had bought out his partner in 1926?

A. Yes, was it '29? I don't know what year it was that we added that additional cash. '26, yeah.

Q. And how much money did he say he paid his partner? A. Fifteen hundred dollars.

Q. Are you sure he told you fifteen hundred dollars, or that he just got rid of his partner?

A. Well, that was the figure that he said, was that he bought out for fifteen hundred dollars.

(Testimony of Robert E. Birch.)

Q. And you're not certifying any of that?

A. No, we're not.

Q. In other words, he told you that at that time when he had an earnings of twenty-two thousand, six hundred dollars, he bought out half interest for fifteen hundred? A. That's right. [412]

Q. Now, I refer you again to your exhibit number one, in the year 1936, you show a purchase of bonds in the sum of three thousand four hundred and fifty dollars, is that correct?

A. That is right.

Q. Can you show on your figures how you reduced your earnings on that year to take care of that three thousand four hundred and fifty dollars?

A. Reduced your earnings?

Q. Well, where did the money come from, if you know?

A. That was from the cash that could have possibly have been accumulated during those years.

Q. And did you reduce it? In that amount?

A. Well, there was other items entered into it. In other words, his income would—partly would offset it, and so forth.

Q. It was offset by income?

A. Well, that's right. Through those years we would have to take everything into consideration.

Q. What income did he have in the year 1936, according to your figures?

A. Well, we figured that there was a total of approximately thirty-three hundred dollars.

(Testimony of Robert E. Birch.)

Q. A total of thirty-three hundred dollars? [413]

A. Yes.

Q. And that year that he earned thirty-three hundred dollars, he bought thirty-four hundred dollars worth of bonds, according to your figures. Now, on these insurance policies—insurance policies that you have listed on exhibit number one of your report now marked as Exhibit A-3, at the end of 1945 you show a—premiums paid of four thousand, one hundred and sixty dollars, don't you?

A. That is correct.

Q. And is that reflected in your net worth?

A. That's been added into it, that is right.

Q. How can you add insurance premiums into net worth?

A. Well, we went on the basis that it was cash outlay. Technically, we shouldn't have added it in. If it was a, for example, a true balance sheet in the sense of the word that you would show the cash surrender value of anything in there. What we were trying to arrive at was the possible accumulation of cash throughout these years.

Q. Well, if he paid out the insurance premiums, how could he have it as cash?

A. Well, he built up one against the other, is the way we would term it. In other words, it reduced his cash but he built up his insurance. [414]

Q. Well, how could he build up the insurance by paying premiums. Wouldn't it be the cash surrender value of the policy?

A. Yes, probably we should have put the cash surrender value.

(Testimony of Robert E. Birch.)

Q. In other words, this isn't a true asset, is it?

A. Not entirely, no. It wouldn't be an exact asset.

Q. In other words, you actually—if there had been an accounting system here, you should have figured the cash surrender value, rather than——

A. We should have put the full surrender value, yes.

Q. On your exhibit number two, you have the earnings of the business and you have Mrs. Barcott's cash received, and you show her as receiving how much? How much did you figure that she received, how did you arrive at that?

A. Why, we figured on a basis of sixteen years, seven and a half dollars a day, for three hundred days a year. It was about twenty-two hundred and fifty dollars a year.

Q. In other words, you figured that Mrs.—were you told that those were tips that she——

A. That's right.

Q. So you figured that over a period of sixteen years, in your figures, that she received seven dollars and a half a day, working every day in the year, practically. [415]

A. Well, three hundred days, that's practically every day in the year.

Q. That's six days a week, practically, and Sundays off. And so you figured that, from what year to what year?

A. Well, the years we had here, from 1920 through 1935, a total of sixteen years.

(Testimony of Robert E. Birch.)

Q. 1920 to 1935, a total of sixteen years.

A. Uh-huh.

Q. Did they tell you that she took a trip to Europe and wasn't working?

A. Well, we understood that that was part of it——

Q. Did you take out the time that she was gone to Europe, or did you pay her seven and a half a day all the time she was in Europe?

A. Well, I believe it was included in there.

Q. In other words, you gave her seven and a half a day. How could she get tips when she was over in Europe?

A. I really don't know how she could have.

Q. And when was she married to Mr. Barcott?

A. I don't know the exact date.

Q. How many children did she have?

A. Well, there was two, and three, I believe, as far as I know.

Q. Two and three? [416]                      A. Well,——

Q. When did you start figuring him with an exemption for a wife? Wouldn't that be the time that you decided that she was married?

A. That was 1920.

Q. In other words, you have it figured that they were married in 1920?

A. That's when the exemption came through, yes, 1920.

Q. Well, now, who told you that they were married in 1920?

A. We were told that it was around 1920.

(Testimony of Robert E. Birch.)

Q. Around 1920. By whom?

A. I believe it was Mr. Barcott.

Q. Mr. Barcott told you that he was married around 1920, and you gave him an exemption for a wife from that date, is that right?

A. That's right.

Q. Now when did you give him his first exemption for a child?

A. Well, I believe his son came over, so we gave him two hundred dollars in that year, too, that year.

Q. You gave him what?

A. We gave him two hundred dollars for his son, that was born over——

Q. Exemption? [417]                      A. Yeah.

Q. For his son, when? When did you start that?

A. In 1920, two hundred dollars.

Q. Right away. And when was the next child that you gave him an exemption for?

A. I believe it was 1924.                      Q. 1924?

A. I'll have to check that and see. Yes, it would be 1924 when a change was made. Yes, 1924 would be eight hundred dollars.

Q. Eight hundred dollars, that would be for another child, is that right?

A. That's right, that's true.

Q. And did you take any time off for her to—off from the seven and a half a day, for her to have this child?                      A. I didn't.



(Testimony of Robert E. Birch.)

Q. You paid her seven and a half a day for tips all the time that she was at the hospital having the child. And when did you—you had another exemption for another child, didn't you?

A. 1925.

Q. And did you give her any time off then to have the child, or did you pay her seven and a half all the time that she was having the child?

The Court: You'll have to answer out, we don't get your nod.

The Witness: I beg your pardon, your Honor.

A. No, we didn't take that into consideration.

Q. You didn't take that into consideration?

A. No.

Q. Did they tell you that she was a cook some of the time?

A. No, I don't remember anything on that.

Q. Did you give her time for tips when she was a cook, just as much as when she was a waitress?

A. Well, we just took a blanket seven and a half dollars a day.

Q. No matter whether she was away on trips or having children or anything, you just gave her seven and a half a day and making it clean.

A. That's right.

Q. Your figures would be entirely different if the tips had been only four dollars a day, wouldn't they?

A. Yes, it would have made a difference.

(Testimony of Robert E. Birch.)

Q. Now, turning to your exhibit number three, you—living expenses, seven hundred and fifty dollars a year. That's what you charged in 1919, is that right?

A. That is correct.

Q. He was married that year, according to your figures. [419]

A. I believe he was married in 1920.

Q. Well, seven hundred and fifty dollars was living expenses in 1920. He was married that year, is that right? And seven hundred and fifty dollars in 1921. He was married that year.

A. That's right.

Q. And a thousand dollars in 1922, is that right? And he was taking an exemption for a child at the same time. Then you jumped his living expenses to fifteen hundred dollars a year. What was the basis of that kind of figuring?

A. There was no particular basis. I mean, in other words, your living expenses was more or less a guess on it.

Q. Were you juggling these figures in order to get a certain result?

A. No, we weren't juggling any figures.

Q. What's your reason for going from seven-fifty to one thousand, to fifteen hundred?

A. Well, it's just an estimate all the way through on it.

Q. Well, then you get down to 1931, and then you go to 1932 and you only charge him twelve

(Testimony of Robert E. Birch.)

hundred dollars for living expenses. Why do you drop down from fifteen hundred. Had it become cheaper to live for him after 1930? [420]

A. That is just another, as I say, just another estimated figure that we used.

Q. Who gave you these figures, or did you just pick them out of the air?

A. We just assumed that it would take approximately so much, we talked to him——

Q. Who are “we”?

A. Mr. Barcott said it would cost so much maybe to live, or somethink like that.

Q. You mean you and Mr. Barcott together?

A. Well, my partner was with me, and so forth.

Q. Who is your partner? A. Mr. Vale.

Q. Mr. Vale. So you and Mr. Vale and Mr. Barcott, you were assuming all these things in order to get these figures together, is that right?

A. We assumed his living expenses would amount to so much.

Q. Well, did he give you any reason why they should drop fifteen hundred to twelve?

A. No, there was no reason given.

Q. Well, that——

A. We told him—we asked him if approximately that would be right, and he said, “Well, probably it would be about right.” [421]

Q. Well, he had more children in 1930 and '31 than he had in 1923, didn't he? He didn't have any children living with him in 1923. He had a boy in Yugoslavia, and you give him fifteen hundred

(Testimony of Robert E. Birch.)

dollars a year to live on, and in 1934—'33, '34, '35, '36, '37, '38, '39, and clear up to 1945, you just charged him twelve hundred dollars, and gave him twelve hundred dollars for yearly living expenses.

A. That's an estimate.

Q. Does that seem logical to you as an accountant?

Mr. Gagliardi: I object, if your Honor please, because of the conclusion the jury draws——

The Court: Objection will be overruled.

A. Well, it's hard to tell on living expenses. In other words, I don't think—I personally do not feel that you can determine any particular or any exact amount of living expenses in comparison from one to another. It depends on the type of family they are, how they live, and so forth.

Q. Well, you're up here as an experienced accountant, aren't you?      A. That's correct.

Q. And you're testifying to this Court and jury concerning figures, and you're—that's your business, isn't it? [422]      A. That's right.

Q. You do this all day long for other people, as well as Mr. Barcott.      A. That's correct.

Q. Now, does it seem sensible to you, as a certified public accountant, that a man in 1923, when he had no children, would spend fifteen hundred dollars a year to live on, and from 1932 up to 1946, all during these war years and everything, he only spent twelve hundred dollars a year to live on?

A. It's a possibility.

Q. You believe that?

A. I said it's a possibility.

(Testimony of Robert E. Birch.)

Q. And you'd stake your reputation as a certified public accountant, on that statement?

A. A possibility, that is correct.

Q. Now taking all the figures that you've put together here with all these seven dollars and a half every day over all these years, and down to the item in exhibit number three, you still show an understatement of income, don't you? That they are still liable in income tax.

A. No, I wouldn't say that.

Q. Well, don't you show a difference of forty-three thousand, six hundred and eighty-six dollars and eighteen cents, which is an understatement by them— [423]

A. Oh, I see what you mean. Excuse me, I didn't quite understand.

Q. Isn't that correct?

A. Yes, that's right.

Mr. Pomeroy: That's all.

### Redirect Examination

By Mr. Gagliardi:

Q. Mr. Birch, in 1920 what exemption do you give Mr. Barcott, what living expenses you allowed to him, according to your figures?

A. In when?

Q. 1919.

A. Seven hundred and fifty dollars.

Q. And in 1920 how much?

A. Seven hundred and fifty dollars.

(Testimony of Robert E. Birch.)

Q. And in 1921?

A. Seven hundred and fifty dollars.

Q. And then in 1922, you increased to what?

A. A thousand dollars.

Q. Was that the time when the child was born?

A. Yes, I believe that is correct. In 1924 there was an additional child.

Q. How many children did they have in 1924?

A. They had two.

Q. Two children. Then between 1920 and 1924 were two children born. In 1923, do you increase the amount for living expenses to fifteen hundred dollars?

A. That is correct, we increased it.

Q. And you keep that up until 1932, is that right?

A. That is right.

Q. Was that the time when John—that is, Anton worked in the restaurant himself and become self-supporting, and then he got married?

A. I don't remember the exact date that he got married.

Q. Anton got married in either '33 or '34, I don't recall—the jury will remember—but is that the reason you reduced the amount of expenses from fifteen hundred to twelve hundred dollars?

A. Yes, and that year, well he had three dependents for a period of years, and in '31 it dropped to two.

Q. And then——

A. In '32 it was two.

Q. Two, and in '33 what were they?

A. In '33 there was two. He had two.



(Testimony of Robert E. Birch.)

Q. And up to what date?

A. Well, we have it all the way through.

Q. All the way through, only two. [425]

A. Yes.

Q. And was that the reason that you——

A. It could have been the reason. I don't remember now.

Q. You were called about a week before this case was tried and you prepared this report.

A. That's right.

Q. Now, in allowing Mrs. Barcott to take a trip to Europe, you didn't allow any deduction for her regular income of seven dollars and a half in tips which you allowed?

A. No, we didn't make a deduction for that.

Q. You did not take in consideration that she had six thousand dollars when he started out in business?

A. No.

Q. Would one offset the other?

A. Well, it would take a little figuring, but I believe it would.

Q. And the same is true when she give the birth to the children? How many days in the year you figure that there was her seven dollars and a half income include? How many days in a year?

A. Three hundred days.

Q. Three hundred days. You left the fifty-two days out.

Mr. Gagliardi: That's all. [426]

(Testimony of Robert E. Birch.)

Recross-Examination

By Mr. Pomeroy:

Well, Mr. Birch, you said it would take a little figuring. When one six-thousand-dollar item would offset another figure of her trip to Europe, now how—you just do a little figuring and show us how a six-thousand-dollar item is offset by one hundred days at seven dollars and a half a day.

A. I didn't say it was exactly offset; I said it would approximately be the same.

Q. Well, how do you figure that?

A. It wouldn't be, it's true.

Q. Well, what would be the figure, between six thousand dollars and a hundred days at seven dollars and a half a day? If you can say that's approximately the same, why, you show us the figures.

A. Well, maybe that—there is quite a bit of difference in there, there's about five thousand dollars.

Mr. Pomeroy: That's all. [427]

Redirect Examination

By Mr. Gagliardi:

Q. That is five thousand dollars to our credit?

A. That's right.

Q. Well, my question as propounded to you was not to give us the correct figures, it was, would the six thousand dollars offset any possible day that you didn't take in consideration?

A. It could have, yes.

Mr. Gagliardi: That's all.

(Witness excused.)

The Court: Do you have any other witnesses?

Mr. Gagliardi: I think that we have no other witnesses, Your Honor, some stipulation that will have to be made between counsel, if two counsel have agreed. I don't know what they are, but maybe they——

Mr. Pomeroy: There was a stipulation to be agreed upon, and also I would like to call Mr. Barcott back for a few more questions.

The stipulation is to the effect that [428] Thomas F. Ray was a qualified attorney engaged in the practice of the law in the City of Tacoma, from 1906 until his death in 1944; that John Barcott was a client of Mr. Ray for a period of about fifteen years, beginning about 1928; that about May, 1943, Mr. Ray removed all of his office records and files from his office in the Puget Sound Bank Building, Tacoma, to his daughter's home near the Lakeside Boat Club, American Lake; and that after his death, sometime up until the present time, these files have become lost, scattered, or destroyed.

Mr. Hale: There is a stipulation between counsel for both sides, if Your Honor please.

The Court: Very well, the stipulation will be entered as a fact. The Court heard the reading of the stipulation in reference to Mr. Barcott's employment, and what records Mr. Ray had during that time was lost after the death of Mr. Ray. That is a statement of fact.

Mr. Pomeroy: There is another stipulation, if the Court please, that on the income tax return of John Barcott for the year 1945, there is an item

of twelve hundred dollars as being received by [429] John Barcott under the heading of "Other Sources, Miscellaneous" and that this twelve hundred dollars was added to the income tax return by the persons preparing the same, on the instructions of Mr. Ursich, the attorney for Mr. Barcott.

Is that the stipulation?

Mr. Ursich: To compensate for food which might have been taken out of the restaurant at that time by Mr. Barcott.

The Court: The jury will understand the stipulation just made as taking out of the case that particular item as it is agreed by both parties that situation actually took place.

Mr. Gagliardi: I have Mr. Birch for a little further testimony, Your Honor. I had forgot a few questions concerning dividends and interest, which I didn't question him. Mr. Birch, will you——

Mr. Pomeroy: Well, I'll stipulate that he has dividends and interest and they are approximately the same as what we have in there.

Mr. Gagliardi: And that it is reported in the income tax——

Mr. Pomeroy: It is reported. [430]

Mr. Gagliardi: That's right.

The Court: And you say you have a short question of the defendant, or two?

Mr. Pomeroy: I have two or three questions, it is not very long.

The Court: The defendant will take the stand.

The Clerk: Plaintiff's Exhibit 20, for identification.

JOHN BARCOTT

the Defendant, resumed the stand for further examination and testified as follows:

Recross-Examination

By Mr. Pomeroy:

Q. You are being handed what is marked for identification as Plaintiff's Exhibit No. 20, and I'm asking you whether or not your name appears on that exhibit?      A. Yeah.

Q. And you signed that, did you?

A. Yeah, I signed it. [431]

Q. And is that a—well, just a moment.

A. You mean this one here?

Q. Down at the bottom.

A. Yeah, that's right.

Q. You are being handed what is marked for identi—

The Clerk: Plaintiff's Exhibit No. 21, for identification.

Q. —what is marked for identification as Plaintiff's Exhibit No. 21, and I'm asking you whether or not your signature on that exhibit?

A. Yes.

Q. You signed it, did you? What was your answer?      A. Yes.

Mr. Pomeroy: If the Court please, I am now offering Exhibits 20 and 21.

The Court: Any objection, Mr. Gagliardi?

Mr. Gagliardi: We have no objection.

The Court: They may be admitted.

(Testimony of John Barcott.)

(Whereupon the income tax returns of John Barcott for the years 1938 and 1939 were admitted in evidence as Plaintiff's Exhibits No. 20 and 21, respectively.) [432]

Q. All right, now, Mr. Barcott, Exhibit No. 20 is your income tax return for 1938, and that was prepared by Mr. Thomas Ray, who was your attorney, is that correct? A. Yes.

Q. And he prepared this merely from figures that you gave him, is that correct?

A. From my books, yeah.

Q. From figures that you gave him.

A. Yeah, from the books.

Q. And in 1939, which is Plaintiff's Exhibit No. 21, your income tax, that was prepared by Thomas Ray, is that correct? A. Yeah.

Q. And that was prepared by him from figures that you gave him?

A. Yeah, from the books.

Q. Well, you told him the figures, isn't that correct?

A. Yes, he was, he got the book and figured out of the books.

Q. Yeah, but you did the figuring, didn't you?

A. No, he was figuring himself how much we take in, how much we pay out and everything else.

Q. Well, weren't some of those books written in different tongue and a different language than English? [433]



(Testimony of John Barcott.)

A. Well, it was, he asked me for what's, how much, what's how much we take in and how much we pay out, and how much there's left. And he knows what it is. So many years he was doing that, and so sure he knows that.

Q. I believe you testified that you had a conditional sales contract on this electric stove at your home, in sometime in 1938, and you made payments on that, is that correct?

A. Something—that's right.

Q. All right. Now, in 1940 didn't you buy some equipment from the City of Tacoma Public Utilities for a hundred and one dollars and—this is in 1940, and also taken on conditional sales contract and you made payments on that?      A. 1940?

Q. Yes.

A. It must be toaster. electric toaster for Oyster House.

Q. All right. Now, I'll ask you whether or not you didn't buy some equipment in 1942 from the Robar Manufacturing Company for three hundred and six dollars, and you also bought that on a conditional sales contract?      A. Robar?

Q. Yes.

A. Something for the Oyster House, it must be.

Q. Yeah, and you bought that on a conditional sales contract. [434]

A. I think so, on payments, yeah.

Q. I'll ask you whether or not in 1939, October 18, that you didn't buy from the Underwood-

(Testimony of John Barcott.)

Elliott-Fisher Company equipment in the amount of sixty-six dollars that you bought on a conditional sales contract.

A. Yeah, I did, I thinks. I no have to pay—I know I no have to pay any interest on it, so——

Q. And I'll ask you whether or not in 1937, you didn't buy furniture from the Kaufman Leonard Company, and signed a conditional sales contract and make payments on that for furniture in the sum of four hundred forty-eight dollars?

A. I think, I think so.

Q. Now, did you pay for those—those payments on all the things I've just mentioned to you, from your wife's tips or from your earnings?

A. Now from my wife tips at that time, I bought those things from the restaurant, I pay from the restaurant.

Mr. Pomeroy: That's all [435]

Redirect Examination

By Mr. Gagliardi:

Q. Were those that you bought from the City of Tacoma, who bought it, your wife or yourself?

A. No, myself, for the Oyster House.

Q. For the Oyster House?

A. He says, you no have to pay, he says five dollars a month, that's all we had to give him, he says you no have to be bothered or anything, that's the reason I do it.

Mr. Gagliardi: That's all.

Mr. Pomeroy: That's all.

(Witness excused.)

The Court: Do you have any further evidence, Mr' Gagliardi?

Mr. Gagliardi: We have no further evidence, Your Honor.

(Defense rests.) [436]

The Court: Do you have any rebuttal, Mr. Pomeroy?

Mr. Pomeroy: One witness.

The Court: How long will it take?

Mr. Pomeroy: Well, two or three minutes.

The Court: Since it is past the hour for lunch, we will take intermission now until two o'clock, ladies and gentlemen of the jury.

(Noon recess.) [437]

2:00 o'Clock P.M.

Mr. Pomeroy: We have decided to rest our case, with the evidence already in, so at this time the Government rests also.

The Court: Well, there are some matters, ladies and gentlemen, that the Court needs to take up in the absence of the jury, and I am going to ask that you just step outside the hall there and close the door, and the Court will take up these matters.

(Whereupon, the jurors retired from the courtroom.)

Now, Rule 30 of the Federal Rules of Procedure provides that the Court inform counsel of its proposed action on the requests, prior to the arguments to the jury, but the Court shall instruct the jury after arguments are completed and I am going to

at this time indicate to you on your requests the attitude that the Court takes in reference to them, taking up first the request of the plaintiff.

Mr. Gagliardi: May we be heard first on our motion for judgment of acquittal, Your Honor? We desire at this time to make our motion that Your Honor enter a judgment of acquittal. [438]

The Court: Yes, you may be heard now. I am not going to hear any argument on the matter. I will let you make your motion because I gave you almost an hour's time at the conclusion of the Government's case. [439]

Mr. Ursich: Very well, if Your Honor please, I will just make a brief statement.

Your Honor, at this time we are again asking the Court to—we are making a motion at this time for a judgment of acquittal on the grounds and for the reason that there is insufficient evidence upon which to convict the defendant as charged. The indictment and the bill of particulars indicates that we were to be put on proof, they would be showing an income from a certain business known as the California Oyster House.

I submit to Your Honor at this time, that there has been no evidence whatsoever introduced to the effect that any income was derived from said business which was not previously reported by the defendant.

The Court: Well, I suppose you submit the authorities that you did at the close of the Government's case, and the arguments that you made at that time you desire to have considered at this time.

Mr. Ursich: Yes. We have some further authorities on the matter of the bill of particulars which we can submit to Your Honor in writing, or I can briefly——

The Court: No, I do not think that is necessary, Mr. Ursich. I shall have to deny the motion [440] and grant you an exception.

Mr. Ursich: Very well.

The Court: Now, we will take up this matter of the instructions.

On the plaintiff's request that Instruction No. 1, that is given in substance, though the language may be somewhat different than that submitted by the plaintiff.

The requested Instruction No. 2 is likewise going to be given by the Court in substance, and the same is true of the requested Instruction No. 3.

The requested Instruction No. 4 is given.

Now, as to the defendant's requested instructions, defendant's Instruction No. 1 will be given in substance.

Defendant's requested Instruction No. 2, the first paragraph of it will be given in substance, the paragraph beginning with line 20, sub (a), is refused, and (b), beginning with line 24 is given in substance, and (c), beginning on line 28, continuing through to the next page, is refused.

Instruction No. 3 as requested, is given in substance, and the same is true of Instruction No. 4 as requested. [441]

Instruction No. 5 is given.

Instruction No. 6 is given in substance.

Instruction No. 7, the first paragraph of it is given in substance. The second paragraph is refused as not being an issue in this case.

The supplemental instruction which I have numbered 8, for the purpose of the record, is given in part and refused in part. The second paragraph of your Instruction No. 8 is given generally, in language other than the language in which you have submitted it.

That part of the first paragraph of your Instruction No. 8 will be given which reads:

“You will not be justified in this case of convicting the defendant of having wilfully and knowingly attempted to defeat and evade the payment of his just tax.”

That is not in that language, but the last phrase of it is not being given. That is the language reading:

“If you find that small amounts were omitted from his income tax return which could easily be overlooked or forgotten by the defendant.” The Court declines to give that, and I might state to counsel, because the Court is going to instruct very specifically upon the [442] fact that there must be a wilful attempt to evade the tax. The language of the act doesn't state the amount. It may be a large amount or it may be a small amount, or it may be an indefinite amount, and of course if it was an unintentional evasion of some small item, why it would not—could not possibly, under the general instructions as the Court gives them—



Mr. Gagliardi: Under the rule is it incumbent upon the defendant to except now, Your Honor, or the exceptions allowed without be taken?

The Court: I think you might as well make your exceptions if you wish now, as to what the Court has refused to give, but you will have an opportunity at the conclusion of the case, in the absence of the jury, to make your exceptions to the instructions as a whole.

Mr. Gagliardi: Then at this time the defendant excepts to Your Honor's refusal to give that part of Instruction No. 2 which Your Honor has designated you refuse to give.

Also the part of Instruction No. 7 which Your Honor has refused to give, and that part of Instruction No. 8 which Your Honor has refused to give to the jury. [443]

The Court: The exceptions will be noted and allowed, Mr. Gagliardi.

Now you may bring in the jury.

Mr. Pomeroy: It is my understanding we will have an hour, each?

The Court: Yes.

Mr. Pomeroy: I would like to be notified when I have talked a half hour so I can gauge my time, and I suppose I will have the balance of the hour for concluding my argument?

The Court: Yes.

(Whereupon, the jurors resumed their seats.)

The Court: You may proceed now, Mr. Pomeroy, with the argument. [444]

Mr. Pomeroy: If the Court please, and counsel, and ladies and gentlemen of the jury:

Although I think for practically all of you this is your first opportunity to be a juror, I want to thank you for your kind attention. You have all been very attentive to this case, and it is an important case. It is important to Mr. Barcott, the defendant, and it is also important to the government. We are each going to argue our side of the case to you, and after that the Court will give you instructions. These instructions are going to be given to you orally; they are not written in Federal Court, and then you will retire with the exhibits which have been admitted in evidence, and your recollections of the evidence and instructions of the Court, to deliberate and bring in a verdict in this case.

Sometimes I think that an argument is kind of an anticlimax to a trial. A case is tried on witnesses, and the facts, and when you clearly have those in mind, why, it isn't necessary for the attorneys to argue, because after all, all we can do is argue the way we see the case and try to recollect as closely as we can what we think the witnesses said to you on the stand and what we believe about their story.

You don't have to believe any of us attorneys as to what we say in this argument, because [445] you have your own recollection. In fact, you are closer to the witness than we are. There isn't a witness that has been in this case that I think that I ever saw before in my life, so you know just about as much about them as I do. But it is our chance, at

least, to explain to you what we think the material facts in this case are, and what we think you should pay attention to and think about in bringing in the type of verdict that each attorney would like to have you bring it.

Now at the opening of this case, if you recall, I made an opening statement of what I thought the evidence would show, and I believe what I stated to you at that time was borne out when these witnesses took the stand, and we proved to you through this evidence the various things that I pointed out in that opening statement, and if you recall, I read the indictment to you. Now this indictment, again, is not evidence, but the original of it will go to the jury room with you, merely to point out to you what the defendant is charged with.

In this indictment, as I told you, contains three counts. Each of them relate to a wilful evasion of income taxes. The first count deals with the year 1943; the second count for the year 1945, and the third count for the year 1946—the third [446] count 1945, is that correct? Thank you, Mr. Gagliardi. And as I told you before, the amounts involved here must be proven as substantially true. There must be some substantial evasion of income tax in order for you to bring back this verdict of guilt, and as I pointed out to you before, this is half of the income of this community of John Barcott and his wife. That is, she reported just as much as he did on a community basis, and therefore, they are not being charged with the half of it—of the income that we claim that they actually made: and we point out in

Count I in which the grand jury return of the indictment, the dividends, \$140.00; interest a hundred forty-one ninety-three; interest on bonds \$200.00; income from business \$24,621.96, or a total income for the community for the year 1943 of twenty-five thousand a hundred and three dollars and some cents; whereas, he only reported twice the amount of \$6,720.00, or about half, and should have reported about twice the amount that he did, according to those figures.

In Count II the charge is made that he only reported \$5,632.57, which is half of the earnings of the community, and our allegations are when we total up what we claim he made, that he should have reported \$10,426.61; and [447]

Count III charges that he claimed that he received as half of the community income \$7,388.98, and we claim he should have reported \$11,638.92.

There is no other way we can present a case to you except by bringing these witnesses here, and testifying as to what they know about these allegations that we make in the indictment; and I think one of the instructions that the Court will give you, that you are the triers of the fact. In other words, each one of you is a judge in himself or herself, of the facts of this case. The Court will instruct you what the law is, but each one of you is a judge as to whether the person is telling the truth or not—as to whether or not the facts are as we claim them to be. So, each one of you is a judge in that respect.

And I believe the Court will also instruct you that if you find that a witness is testifying incor-

rectly or falsely about a material thing, you are privileged to disregard his or her entire testimony. And this same instruction is true as to the defendant, as much as it is to any witness; that if you believe that he has testified falsely in any material thing, then you are at liberty to disregard all—any other testimony that he may give, except that which may be corroborated by other good and competent proof. Now I want you to bear that [448] instruction in mind, and most of you, as I understand it, have never heard these instructions before, and therefore I wish you would pay strict attention to that because I think it is important in this case that that instruction be given strict attention.

Now when you go to the jury room, besides the formal indictment, you will take all these exhibits with you. These exhibits, as you recall, will show you the actual income tax return—a photostatic copy of it, of Mr. Barcott, and show you copies of his bonds and where he purchased them, so you can check the figures as you recall them from the evidence. You will have other income tax returns. You will have computations from the bank and you will have photostatic copies of deeds and conditional sales contracts, and so forth, and you ought to go over them at length in order to arrive at your verdict.

Now as far as our case is concerned, it's all contained in one witness, and that is Mr. Swanson, here. And as you recall, I explained to you how these amounts were arrived at, and then you recall last week they had Mr. Birch, a certified public



accountant, make a similar computation, and after all the—I'm not much of an accountant myself—I don't know how many of you are, but I doubt if many of you are much of an accountant [449] either when you listen to the way these other accountants go about it. In fact, I need help in fixing up my own income tax. Well, after the testimony is blown away, we find that even Mr. Birch testifies that there is an understatement of \$43,000.00 in income tax that he can't account for. That's his own testimony after the way he figured it from the figures that Mr. Barcott gave to him.

And Mr. Swanson testified they found this \$23,000.00 in cash, and he was not charged with that. That was given to him. We didn't even figure that in our computations. They took the savings account in the National Bank of Washington; they took the checking account in the National Bank of Washington. They took the United States Savings Bonds at cost, and that is the one item, as I explained to you, that jumped so much from December of '42 until December of '45, and broken down you could tell just exactly in what year, and of course these exhibits will show you—you can look at the dates on them. You will find that outside of those few Baby Bonds that were bought in '37 that all the bonds were bought during that—those years when income was so great in the City of Tacoma.

They figured his home and furnishings; his business fixtures; the stock in the Fisherman's Packing [450] Corporation; the lots that he had out here in Tacoma, and then these other two lots that he



paid, so we thought, \$750.00 for, and there is a sheet in here, I believe, that says that is now a thousand dollars; and so after you compute the whole thing you find these figures which I read to you and which you will read when you go into the jury room with that indictment and I am sure that these figures will check, because you can see what a deal that Birch had to go through in order to clarify these figures, or change your mind about them, and when it was all broken down, even with the figures that he admits he put in there, such things as insurance company premiums, which he as a certified public accountant knows are not assets. All you can put in as assets, and most of you have insurance policies, is the cash surrender value of that policy, not how much in premiums you pay each year. But after he built the whole thing up, he says that the man had thirty thousand dollars on December 31, 1945. Well, we found only twenty-three thousand, so that is giving him credit for only seven thousand more, and still his figures still shows that he was out forty-three thousand. If you add the seven thousand on he would be fifty thousand off. We don't know where the \$7,000.00 is. Perhaps at the time Mr. Barcott had \$7,000.00 some place else than in this one [451] safe deposit box that we happened to look into, because as you recall, in his own testimony and in the testimony of Mr. Nielsen, he thought it was only ten thousand to begin with but it turned out to be twenty thousand.

Now these witnesses that testified before you—this case is—this is the third day, a little over a

week end, and I would just briefly like to go over the way that I—I—I noticed these witnesses and what they said, and what's material to this case.

Mr. Barcott at no time until he came into this court room has made one iota of a statement about tips, but that's the defense that they finally bring in here at the last minute at the time of trial. I think that is a very novel idea. I never heard that one before, but I think that's a pip. They lived on the wife's tips over all these years and he saved every nickel—one of the most ridiculous stories that I have ever heard of. If he can get twelve good people and true to believe that, then he deserves to be acquitted, because that's the most ridiculous statement—the most ridiculous defense that I ever heard of, but he had no defense until he walked into this court room. What did he say to Mr. Swanson? What did he say to Mr. Nielsen? Did he ever mention tips? Did he ever mention tips to anybody? No. When is the first you hear about it? When he walks into [452] here. He had to have a defense. What am I going to do? Tips, which is rather embarrassing to the wife, to all his friends. In other words, his wife has to take the stand, and you know as well as I do that the wife is going to protect her husband as far as possible, and I don't blame her. I think that is right, but to put that woman through that embarrassment and getting her on the stand and telling the things that she did, all through their married life, I think is terrifically embarrassing to her.

Now she gets on the stand and says that she never had a day when she received less than seven dollars in tips. It was often eight dollars, and sometimes on week ends it was ten and twelve dollars. Now this, mind you—the testimony goes on from—all the time she worked there, through the depression and all years. It's fantastic, unbelievable.

Besides that, when they go to cook up the books and fix up the books, they give her credit for seven dollars and a half tips all through those years, and you remember her own testimony was that some of the time she wasn't a waitress. She was a cook. Are they trying to tell us that people—customers, walked in there and walked back in the kitchen and handed her a tip, so she collected seven dollars and a half worth of tips when she [453] was cooking?

She had two children during this time. Took a trip to Europe. She had a trip—she said "I had other trips," something about a world's fair in California. Trips to Aberdeen, and still, they build up these books \$7.50 a day she took in in tips. It's a very fantastic story. I didn't cross-examine her much about it. I can't see how anybody could believe it, and in the way that a wife should, she said "I gave all my money to my husband. I never kept anything. I gave him everything I had." That's probably true. I think this man loves money, and I think he has held on to whatever he could. I think probably they have lived frugally, and I think he does like money, but he never was able to accumulate the money that he now has except during these war years when business was good in Tacoma.

Then one of the worst pieces of acting I have seen in a long time was when they brought in this poor woman, Mrs. McCord, and put her on the stand—a waitress who had been there for years, working now for Mr. Barcott, and bringing out the fact that her son was killed in the war and making her cry on the stand. One of the worst pieces of ham acting I have ever seen anybody pull for a long time, and then try to get the woman to testify to these tips, and she couldn't. She wasn't [454] going to get up here and perjure herself. I think she was honest, and I felt sorry for her taking the stand. She wouldn't testify what the tips were during the depression, and why? You know as well as I do. They didn't make that kind of money during the depression. It's silly to even think so, and I think her testimony was fair when she said that her average tips since 1938 was a low of \$3.00 and a high of five. Now that's a pretty fair estimate. I think that woman was an excellent witness. It's too bad that she had to be dragged in here for the purpose that they used her.

Then they bring in Mrs. Dasher, another waitress. They bring her in because Mrs. McCord didn't do a very good job for them—they bring in Mrs. Dasher. She has been a friend of theirs for about twenty years. In fact, worked there. Then she testifies what? Just exactly what they have been looking for. Somebody to testify that they had been making a lot of money in tips, so she says "Yes, why I was making a lot of money in tips. In fact,

I made \$60.00 a week or sixty or better a week in this place." Now this is, mind you, in 1931, but she gave up her job and went to California and came back and worked on the Gig Harbor line. If a woman, such as she appears to be, were making—was making sixty dollars a week, do you think that she would give up that job? [455] That was a pretty good job in those days. You think back to 1931. If this waitress was making that much money she wouldn't be giving up that job to go off some place else and come back and work on this other lunch counter.

Mr. Knaga took the stand. He's a friend of the Barcott's, and I don't know yet exactly what the reason for calling him on the stand was, except to prove that he charged—Barcott charged Knaga some money. He says he borrowed five, or six, or seven hundred dollars—he doesn't remember how much, and so he gave him a deed, but the deed came from somebody else because Knaga hadn't bought it yet—somebody by the name of Pellys gave the deed to Barcott, and then he takes it back. Did you pay him any extra money for the loan of this five, or six, or seven hundred dollars? No, he didn't pay any more. He couldn't explain why it was one thousand dollars written right in there, so if he only borrowed five or six hundred dollars this fellow Barcott was really charging him for it—not that it makes a great deal of difference, but it shows he did make some money off of it. Whether that was reported or not I don't know.



Then they had Anton Barcott take the stand. Now Anton Barcott seems like a pretty fine young fellow to me, and I liked his testimony very much. He worked [456] for his father and his stepmother down there, and liked to work down there. The odd thing is that they had him working for carfare and they gave him fifty cents once in a while to go to a show until he got married. Then after he got married they paid him fifteen dollars a week, and do you remember Barcott's story about the real estate contract and selling him the house? He says "Yah, I made him sign a real estate contract and made him pay in the bank because he was a spendthrift with his money,"—throwing his money around. Fifteen dollars a week and married. Barcott says he was a spendthrift, throwing money around. But he turns around in 1946 and gives him the business. I guess he wasn't a spendthrift any more, he couldn't throw away that fifteen dollars a week that he and his wife earned. The young fellow really worked down there and I think Barcott got the results of his labor, and I don't know yet who actually owns the California Oyster House today because Mr. Barcott likes money, he got into income tax trouble in 1946, and he turned around and turned it over to his son. He's still a young man. He's pretty healthy. I don't think he would have given it away if he didn't have a feeling of guilt about this matter. He turns around and gave it to his son. It's a pretty close family. I don't know whether that bill-of-sale or whatever was made out is actually a bona fide bill-of-sale or



not, but I certainly can find no fault with Anton Barcott, and I certainly think it's rather odd to call him a man—a spendthrift or throwing his money away on fifteen dollars a week when he was married.

Mr. Suryan took the stand. He's a brother-in-law of Barcott's. Suryan was the one they called in, as you recall, because of the fact that this income tax evasion case was started by the fact that it was reported that Mr. Barcott had received ten one-thousand dollar bills over at the bank. This was in January, 1946. Mr. Suryan takes the stand to show that he was really the one who was going to borrow some money from Mr. Barcott. What is his testimony? Apparently that wasn't very well straightened out, because he said yes, the summer before he was planning on having a boat built which would cost him about \$40,000. and that's when he wanted to borrow the money, the summer before. Then he decided not to build a boat, but he was going to buy one, and then he bought one. Well, when did you buy it? Oh, just after Christmas. Well then they hemmed and hawed around a while, and finally figured it was over in February. Why did they have to get it over in February? Because he didn't go down to get these ten one-thousand dollar bills until January. That's why they had to push that over, but what is the thing we should remember is, that the man said the first thing that would be the truth. When was it that you bought your boat? Now he was not borrowing the money to buy the boat. It was the summer before that he was going

to build it, but he was going to buy a boat and bought a boat which he wasn't borrowing any money for, just after Christmas. You see the two stories don't fit in together at all.

Then I felt sorry for poor Mr. Birch. Mr. Birch—who has been a certified public accountant since a year ago May, was hired by Mr. Barcott about a week ago to come in here and testify and to build up a system of accounting to justify this tip business which we first heard about when they came into the court room. He starts out, and he admits that none of these figures are his except just the bank balances and so on which he had an opportunity now to see, but that everything was given to him as outlined by Mr. Barcott—that is the amount that they made, they took the amounts that we showed as having been paid in income tax and then he built this whole picture up to the extent that he could justify the statement that he was entitled to have this much cash on hand. In other words, if he didn't spend any money for anything, the whole family expenses came out of the tips of the wife—and he ends up December [459] 31, 1945, with a cash balance of \$30,166.42. Now where was that? Could that have been in this other safe deposit box that we finally heard about sometime later, because, you see, he showed us twenty-three thousand as being the actual cash in money, but Birch figures it up to this \$30,166.42. Now where Mr. Barcott had that extra money, if these figures are correct, I don't know, but remember that he has been figuring this up so that it builds up his net worth over all the years; that he was worth a

lot of money even in 1930—even in 1940, and it wasn't a fact, as we claim; that he made this money during the war years here in Tacoma. And, you know, he never spent very much money. These trips to the World's Fair and back to Europe and so forth, they still were living on what? Fifteen hundred dollars a year up to 1931, and then twelve hundred dollars a year up to the present date. That is the only expenses that they had.

Mr. Birch in submitting his testimony, I think explained to you on the first two or three questions that I asked him, that this is not a certified report; that it couldn't be. There is nobody that can certify a report where he builds up a bunch of figures from what somebody else tells him, where he can't verify them, so although he is introduced to you as a certified [460] public accountant, this opinion—or this evidence that he gives is not certified to you as accurate—only what Mr. Barcott told him.

Then we get down to Mr. Barcott's own testimony. Mr. Barcott took the stand—I believe he was on the stand most of one day, and you have observed him here in the court room and you are the judge whether or not you believe the story he was telling you on the stand, or not. You are privileged to take into account in your deliberations his demeanor on the stand. How did it appear to you? Do you think he was telling you the truth? Does his story hold together? What did he say? He kept referring to poor old Mr. Tom Ray as being his attorney, and Tom Ray had fixed up his income tax blank. Tom Ray died, so because of death can't speak, why that was a pretty good deal.

Now this morning we introduced exhibits numbered 20 and 21. These were prepared by Mr. Tom Ray, the attorney. If you recall the stipulation, we stipulated that he was an old-time attorney here in Tacoma, and he died some time, I believe, in 1944, and his records have been scattered so we couldn't get to them. These are income tax returns prepared by Tom Ray, and let's see what Tom Ray says in his own handwriting. He's not here to speak for himself. On Exhibit [461] No. 20, which is the income tax statement of John and Katie Barcott for the year 1938, it is signed by Thomas Ray, and he inserts this, and you will have it in the jury room to see it—he inserts this right here: "I swear that I have prepared this return for the person or persons named herein." Then he inserts "from figures given me" and that the return and so forth, and then signs his name.

Nineteen thirty-nine is the next year. He prepared this income tax return again. And what does he say on the back of it? He is not here to speak for himself. The same thing, Thomas Ray, who wrote in merely—he uses the word "merely," which I think is rather odd, who wrote in merely the figures John and Katie Barcott gave him. Now there is Tom Ray's testimony as against Mr. Barcott's as to whose figures these are, and how these income tax returns were made. They were the same sets of paper.

Then we also stipulated another piece of testimony that the income tax for the year 1945, after he was under investigation. Mr. Ursich, attorney

at that time, instructed him to add another \$1200. He was under investigation now, and came in with the same slips of paper just about the time he was going to get out from under this deal and sell out to his son and so forth. You will [462] have this in the jury room with you. Look in here, it says "From other sources, miscellaneous, \$1200." Just to add \$1200. on to the thirteen hundred—thirteen thousand. Where did he get it? Why did he do that? Why did he do that at the time of the investigation? Why did Mr. Ursich feel he had better add some more on here? There might be some mistakes, so they add twelve hundred on. Did they think there might be a lawsuit? There might be something in court some time? Better show that we were going to give some more here, because we think we might be under a little bit. Isn't that a lawyer building a case before you have to go to court, before a man is even indicted—before there is even a lawsuit started. Getting something ready to show to you people at some time, why we just handed the government a statement that we are twelve hundred dollars. We don't know but we just want to be sure so we gave twelve hundred dollars, but after they were under investigation.

Do you recall Mr. Bareott's testimony on the stand? He said that he had about \$30,000. He doesn't know how much exactly, but about \$60,000, in 1940, in cash. That was his statement. Now does it sound to you that that could be true? Here's a man that says he has about \$30,000 in cash in 1940.



Do you recall all the conditional sales accounts that he had during those years [463] of small amounts, too. Electric heater, or electric stove for his home. That was about 1938. Paid it off with the interest on conditional sales contracts. In 1940, equipment \$101. Hobart Manufacturing, 1942, \$306. \$1939, \$66. 1937, furniture, \$448. Household equipment, electric company, 1938, does it seem to you that a man who has \$60,000 in cash is going out here and signing a conditional sales contract and paying interest on money? A man that likes money as much as Barcott does? It's ridiculous to try to tell people that he had this cash in there; that he couldn't have paid for these things and saved that interest. He'd do it. They told you how frugal they are. Why they buy shoes at fifteen and twenty cents a pair. You heard that testimony. They were buying that about the time they took the trip to Europe, too. Well, a person that is frugal, do you think that he is going to go down here and leave cash money in a box and go out and pay small amounts of interest on conditional sales' contracts? Is that logical?

Then, back in 1932 or '3 he signed a note. He signed a note up in—for \$200. I believe it was, with the Fisherman's Packing Corporation on stock—18 shares of stock, and he didn't pay that \$200 off, and in 1940 at the time some of the conditional sales contracts were on, they cancelled the note and cancelled out four shares [464] of stock, and with less than 30 days after they cancelled out that note of \$200 they paid a 10 per cent dividend. You heard that testimony. Do you think a man is going to



conduct affairs that way that he's going to turn down that dividend and not have that stock, and since then they have been paying 6 per cent? Why these government bonds, what does he make, two and a half per cent? Why it is ridiculous to think that he had \$60,000 in cash in 1940.

And how did he conduct his business? You heard the testimony that when they checked the cash sales against the register. What was his method of doing business? He destroyed the sales slips that he bought things with. He destroyed the cash register tape. He destroyed all those things. He never kept any books. That's one of the duties of anyone that runs a business, has, is to keep some kind of accounts. And the difference between the amount they took in and the amount that was in cash was different. Over a two-weeks' period of time, if you recall, it ran all the way from about two dollars to fifty-seven dollars. And what was Mr. Barcott's statement? Somebody was dipping in the till. They all go into the till, and so they are short that much money. Well, I think that's true. I think somebody was dipping in the till, and I don't think we have to look farther than Mr. Barcott to find who was dipping into the till, and that cash went into that safe or some place else, and that's how the money was accumulated.

And then, he says, "I was getting so much stuff together, that I had to use two safe deposit boxes." Now this was back in 1942. He had to have two safe deposit boxes because the one in the National Bank of Washington wasn't big enough, but after

he got the second safe deposit box, what did he do? He bought all these bonds and added these bonds and these things to the first box which was so crowded at one time that he had to have a second box. If that were true, why didn't he have to have a second box in 1940 when he said he had \$60,000 in cash? Can you believe a story like that? This man claims he had \$60,000 in cash in 1940. If that were true, he deserved to have two safe deposit boxes in 1940, and not 1942, and actually what he says is true. In 1942 he needed an extra safe deposit box to take care of the cash he was taking out of that register.

How would a guilty man act when he's started to be investigated? Stop and think about that a moment. Don't you think a guilty man would act something like Mr. Barcott did in this instance? He got excited. I think he is a person that naturally would get [466] excited over any kind of an investigation. Most of us do. I do. Anybody does. But don't you think that a guilty man would act a lot like Mr. Barcott has? He told Mr. Nielsen on the first interview all his sources of income, and what was his story? He says, "Well, I'll tell you, the reason I have all this cash is that I save up a few thousand dollars and I go out and buy bonds." Remember that was his story to Mr. Nielsen. That's why he had this cash on hand, because when he saved up a few thousand he went out and bought bonds. When did he buy the bonds, if he was saving up a few thousand and going out and buying bonds? He did it in '42, '3, '4, and '5. That is

when he was saving up these few thousand. It isn't as he now comes in and says "I had this money all the time, and I was patriotic. When they called upon me I went into my safe deposit box and brought out this money and bought these bonds." No, when he was first investigated, he told Nielsen "I save up a few thousand go out and buy bonds." And he didn't deny that when he took the stand. He didn't deny that. You remember Nielsen's testimony. That was it. And I think that's true. He would save up a few thousand in cash; he'd go buy bonds. But when did he do it? During these war years.

Then the story which has nothing to do— [467] the story about what he tried to do to Nielsen, about buying off a government agent, hasn't anything to do with this case except to show some intent on somebody's part. Why do you think Nielsen would tell a story like that if it weren't true? In whose interests would Barcott deny it? In his own. Naturally. He is the interested party in this case. Are you going to say that Mr. Nielsen came up and perjured himself to you? Lie to you? Or is it more logical that Mr. Barcott was the one from what you have seen here who is not telling the truth about that transaction? Are you going to come back in here and tell Mr. Nielsen that he is perjuring himself to you, this government agent who has been working for years on this type of thing? He came in and did his duty.

Mr. Gagliardi: I want an exception to his argument along that line, your Honor.

The Court: Exception will be noted. Proceed.

Mr. Pomeroy: Now, all right, he went down with Nielsen to his safe deposit box. He didn't tell Nielsen anything about the second safe deposit box at that time. He didn't say a word about it. Here are the records, and he couldn't explain why he went back the second time to that other safe deposit box, [468] either. At 11:00 o'clock—you will have this in your jury room—at 10:55 a.m., Barcott went into his on January 28th—that's when he and Nielsen went into that safe deposit box, and they were there quite a little while. You will recall Nielsen was taking down and making an inventory of all the various bonds and things in that box, and here are the slips that will also be in the jury room with you of the Washington Safe Deposit Company. He went in there—and Nielsen didn't know anything about this box—he didn't disclose it, at 12:45 p.m. on January 28th. That is, they went in at 11:00 o'clock and they were there for some length of time and at quarter to one he was over in this box. Two weeks later, approximately, or a little better, February 13th, there was nothing in this box except insurance papers, but after running over there, for whatever he ran over there for—I don't know, he says it was full of insurance papers and deeds, he goes back the next morning at 9:02 a.m.—he must have waited for the doors to open. There's the slip. Now what did he go back the second time for? You remember how he acted on the stand when I asked him why he went back. He never has ex-

plained why he went back on that, but he did say in his direct testimony that he never disturbed the contents of that box on February 13th. Well what did he [469] go back for? Was there more money in that box? Why was he so anxious to get over there in a hurry? He never has explained that to you, in any way. He hasn't even attempted to. He says "I don't remember"—"I don't know."

Now ladies and gentlemen I think that—leaving the case with you I think you recognize that during the war years the California Oyster House and the type of business that you know it is, from the testimony that you have heard here in Tacoma, some of you aren't from Tacoma and some of you are. You probably are familiar with the place, but you know that the shipyards were running at great capacity here in Tacoma; that you had over a hundred thousand men over at Fort Lewis. The Navy was here. A lot of war contractors, and the lumber mills were running to capacity. It was big business in Tacoma, and it was the time that Barcott made this money. People were lined up, I imagine, to go into that California Oyster House.

In the instructions also, the Court will advise you that you can't find this man guilty unless you find he is proven guilty beyond all reasonable doubt. To those of you who have never heard that instruction before I ask that you listen to it very carefully. I have never heard the argument of counsel, but the usual [470] defense argument is that "don't you have any doubts"? "There must be a doubt." The Court will instruct you as to what a reasonable



doubt is, and I think the Court will instruct you something along the lines that it isn't proof beyond all doubt, but it is proof beyond a reasonable doubt. When you are satisfied in your conscience and it has been proven to you to a moral certainty the guilt of a party, and you are satisfied in your heart to your moral certainty that a man is guilty, then he is guilty and is proven guilty beyond all reasonable doubt. I want you to pay strict attention to that instruction because I am sure as most defense attorneys do, they will argue a reasonable doubt to you, and the instruction is very important.

The American people are—it's the American conscience in these income tax matters. It's—our income tax system is set up on a system of faith and trust. You and I—all the American people, we go and are permitted to make out our own income tax returns. They are seldom questioned. It's the way we have of conducting our business, and those of us who honestly try—honestly try to put in a correct income tax, none of us like cheats, or liars about those things because our system of government is standing the test of time today. You and I know, when we see these hearings on communism back in Congress today. [471] We hear about what is going on all over the world, and our system of government today is standing a test. We are being tried. If people feel that you can walk into a court room like this and walk out and get away with what this man did, they don't believe in our system any more.



Mr. Gagliardi: I object to counsel's remarks as improper and prejudicial and not called for, and not supported by the evidence, and as appealing to the passion and prejudice of the jury, and I am excepting to his argument, your Honor.

The Court: The last remark of counsel the jury will disregard.

Mr. Pomeroy: This is an important case. It's important to the government and it's important to Barcott. Other taxpayers are watching what you and I do. When you stood up in this jury box you swore to do your duty as a juror. When we took this case we took it and swore to do our duty as we saw it, and I say to you, ladies and gentlemen of the jury that—let us do that duty. Let us do that duty as we see our conscience clear to do it.

(Whereupon, argument by counsel for the defendant.) [472]

Mr. Pomeroy: If the Court please, counsel, and ladies and gentlemen of the jury:

Mr. Gagliardi brought up the fact that I objected to the introduction of this piece of evidence, which is self-serving. I am sure that the Court will probably state to you that that is a matter of law as to what is given to the jury and what is not. What is admitted into the evidence, let us put it that way, and because he has spoken of it I will stop for just a moment to say that this statement was not admitted here, because of the fact that under law a man who makes a self-serving statement can not use that same statement to further his own case.

You do not have a report in from the government agent. Neither do you have this one, but you have your recollection of the testimony as it was given to you.

Counsel have been very complimentary to me. For some reason they wish to scare somebody about the fact that I happened to come over from Seattle and prosecute this case, and I would like to say now that they have three excellent attorneys on their side and this has been a very difficult case for me. The only reason I am here is that our office is crowded and is busy, and the idea of praising me so highly is not because they actually believe that, but are trying to [473] becloud the issue with you, to the effect that I am likely to say something in some magnetic way that I can get convictions which are not true.

The question was brought up about bringing Mr. Plancich down from Anacortes. He was not brought here to prove any dividends. He was brought here to prove to you the transaction regarding the boat "Ranger" and the number of shares of stock in the Fisherman's Packing Corporation, and that was his testimony if you will recall it. It was not for the purpose of showing how much dividends. We already had that figure.

We were criticized by counsel—by both counsel for the fact that we do not present to you all the various income tax reports way back over the years. I am sure that counsel have probably forgotten it, but there is an act of Congress which had destroyed all of the reports prior to 1938. There are none

in existence of yours and mine or anyone else's. If they knew about that law I am sure they wouldn't have made that argument, because we can not present something that was destroyed by act of Congress.

The—counsel have been talking about this book. The only thing I can say about this book is he had to make his 1946 report—1945 report from the book as it was, because these figures in here have already been put in here, and this book had been shown to the agents. There was no way then to change those figures, and I submit to you when you take this into the jury room remember the testimony where we had it totalled up for your benefit; that after this investigation these receipts jumped up practically two thousand dollars a month. If you will go back through this book you will find that after the investigation started that book jumped nearly two thousand dollars a month, and we took month by month and tried to get them totalled for you, and because of the fact that Mr. Barcott did not have his glasses here, it was impossible for him to do it, and we had to present the figures to you, but it was \$8500 in that month, the previous time was sixty-five hundred. If you recall, that is the testimony and you can get those figures yourself out of that book.

The only reason that Tom Ray's name came up was because of the fact that it was felt by us that responsibility was apparently being pushed on to him for making these income tax returns and that is why these income tax returns were brought here

to show that he qualified what he did. He said "I'm just putting in here the figures that are given to me," and I will also remind you about this book which I have just shown you, that the one that I was asking about, the previous book, [475] he testified he didn't ask for until 1946, last year. Tom Ray had been dead two years then.

Counsel is quite flattering to you, too, that you knew all about criminal cases and referring you to the Capone case and a few others, and talking about the small things that were brought up by the government in this case. That is the only way we can present everything to you. We try to bring you everything that we know about it. The interests, for instance, from Anton Barcott; the appointing of Mr. Knaga and the caliber of the government's testimony. I didn't bring Mr. Knaga here. That isn't the government's testimony. That is their own testimony. Those people are witnesses that we didn't call. They brought them here themselves.

Another argument that counsel makes is to the effect that—I think, the two of them have probably taken their notes down incorrectly, because as I understood Mr. Hale's statement was to the effect that the government tried to say that Mr. Barcott was penniless on December 31, 1942, and then when Mr. Gagliardi gets up, he says that they admit they had \$57,000. Well Mr. Gagliardi is correct in that and Mr. Hale is mistaken, because we never have said that he was penniless at any time. He has always been given credit for having so much money, and of course we believe much more than he has [476] been given credit for.

Another argument that was presented here I think was misunderstood somewhat, and that was my argument concerning the conditional sales contracts. That's true what they say, sometimes we buy something on conditional sales when we have money in the bank. I do it, you do it, and we all do it, but that isn't exactly my argument here. My argument on that point is this: here is a man that says "I have \$60,000 in the bank, cash," not drawing interest—not doing anything, just laying in a safe deposit box, and who is so penurious, so frugal that he doesn't want to pay out more than fifteen or twenty cents for a pair of shoes that his family testified to, but still he goes and doesn't take a nickel out of his safe or out of that safe deposit box, but pays interest on these conditional sales contracts. That's not the same thing as you or I having a thousand dollars in the bank and going out and buying something on conditional sales contract because we don't want to use up all our ready cash. This man, if his story was true, had so much cash he didn't know what to do with it.

In the tips we have talked about, the proposed testimony of Mr. Gagliardi that the average is five dollars a day, I don't know. I never heard that before. It's not evidence. You were told to disregard it, [477] but it certainly was not true back in the days when Mrs. Barcott was working. That was in the middle of the depression—the latter years of her work, so if there is such a thing now, it certainly is entirely different than it was back there, and that lady I think testified correctly that



she couldn't say how much she got prior to 1936. After that it was not a low of three and a high of five.

Ladies and gentlemen, I know we probably talked you out and talked too long. The only thing I can say to you is this, that I think the facts are present for you to bring in this verdict of guilty. If the whole family were working as he said, if every one of them gave all their money to Mr. Barcott as they say, if they never spent a dime for living expenses, they still can't explain these figures away, and when he brings up this piece of paper here that this young accountant brought up here, even his statement is an understatement of \$43,000. It also shows an increase of \$7,000 in cash, and the Court will probably instruct you that when you find there has been a substantial evasion, even though it's not the exact figures in the indictment, that then that is sufficient to bring in a verdict of guilty and I am sure that from the testimony that you have heard, that you know beyond any reasonable doubt, that this man [478] has made a wilful and substantial evasion of income tax.

The Court: Now ladies and gentlemen of the jury, both sides having rested and counsel representing the Government and counsel representing the defendant having made their arguments, we have reached that stage in the case where it becomes the duty of the Court to charge you with what the law is.

In the course of this charge, and I shall read a part of it, I may make some reference to what the evidence was. I may say something that might



indicate to you what I think are the logical inferences to draw from it. I do not intend to do so, and any reference that I make to the evidence will be only for the purpose of making it easier for you to understand the law.

The Court, in a Federal case, has the right to comment on the evidence, to sum up the testimony of the witnesses on both sides. I do not intend to do that in this case, but I do want to impress upon you the importance that you have and your responsibility of determining what the facts are, and likewise what the evidence was.

Counsel have been at some substantial variance here in their arguments as to the evidence. [479] I think they—all three of them, explained to you that you did not have to accept their recollection of what the evidence was, and I instruct you now that you do not. You have to depend upon your own recollection of what the evidence is. Any comment that I might make concerning the evidence, you would not have to accept it, because that is not my responsibility. My responsibility is to correctly state to you what the law is in a case of this nature. Yours, as a member of this court, is to determine what the facts are, and neither of us are concerned with the particular individuals involved, but we are deeply concerned in ascertaining what the truth is, what the facts are, and how we apply the law to a particular set of facts, so I do not want to invade the province, and you will understand from what I have said in the way of preliminary, that I

do not intend to invade the province or responsibility of the jury, and I am going to refer now to this indictment.

The indictment in this case contains three counts. The case is what we call a criminal case, and the indictment is a document that has been returned by the grand jury in this court, and it charges in Count I:

That on or about the 12th day of February, 1944, at Tacoma, Washington, John Barcott, [480] late of the City of Tacoma, State of Washington, who during the calendar year 1943 was married and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income tax, and victory tax, due and owing by him to the United States for that calendar year, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington, at Tacoma, Washington, a false and fraudulent income and victory tax return wherein he stated that his net income for the calendar year, computed on the community-property basis, was the sum of \$6,720.40, and that the amount of tax due and owing thereon was the sum of \$1,545.00, whereas, as he then and there well knew, his net income for the said calendar year, computed on a community-property basis, was \$12,406.00.

And I might explain to you that means one-half of the community income, because the income is divided, and that he reported that he received a hundred and forty dollars in dividends and a hundred and forty-one dollars and some cents in inter-

est, or in—yes, in interest, and then interest on bonds, two hundred dollars, and income from the business, twenty-four thousand, six hundred and twenty-one dollars, or a total of twenty-five [481] thousand, a hundred and three dollars. And then there were certain deductions—contributions, two hundred dollars, and ninety-one dollars and twenty-three cents taxes, leaving a net income of twenty-four thousand, eight hundred twelve dollars. This was a community income, and the amount we are concerned with here is just one-half that sum, or twelve thousand, four hundred and six dollars.

And the charge is that instead of making a return and payment upon said basis, where he would have owed an income and victory tax of \$3,646.25, he made one as I have already indicated.

Now, Count II. It reads very much the same except it eliminates this matter of victory tax, which was not in force in 1944.

And Count III deals with the year 1945; and it eliminates likewise, this victory tax.

Now each of these counts constitutes a separate and distinct offense, and each must be considered by you separately and distinctly. The fact that you may find guilt on the first count would not imply that guilt exists as to the other two counts; and, likewise, that you may find that the government has failed to prove guilt on the first count would not imply that it has failed to prove guilt on the other counts. You must [482] consider each count separately on the question of guilt or innocence of the defendant.

The indictment in this case, must not be considered by you as any evidence of guilt. It will be submitted to you for the purpose of more fully—of giving you an opportunity to more fully understand the charges that the Government makes. And you will therein find, as I have already indicated to you, a more detailed statement of the figures, which the Government claims were falsely represented by the defendant in connection with this charge.

Now, to this indictment, the defendant has entered a plea of not guilty, which puts in issue each and every material allegation of the indictment.

You are instructed that the defendant is presumed to be innocent of the crime with which he is charged, and that presumption attaches to and continues with him throughout all stages of the trial, and throughout all the stages of your deliberations, until it has been met and overcome by competent evidence and beyond a reasonable doubt.

This presumption is a part of the law of the land, to which the defendant is entitled; and unless this presumption is overcome by the evidence in the case [483] beyond a reasonable doubt, you must acquit the defendant.

And, as I have already indicated to you, the fact that an indictment has been returned against him is no proof of his guilt. It is merely a formal instrumentality of bringing him to court for trial. His guilt must be proven independent of the indictment.

Now you are instructed the burden is on the Government of proving every fact material and necessary to a conviction by competent evidence

beyond a reasonable doubt. It is not sufficient that the Government should prove these facts by a mere preponderance of the testimony, nor, on the other hand, is it necessary that he should prove them conclusively or in such manner as to leave no room for any doubt whatever. Very few things in the whole domain of human knowledge are susceptible of absolute proof. We can have a moral certainty or a reasonable certainty, which may vary in degree, but rarely an absolute certainty.

The expression "reasonable doubt" means in law just what the words imply—a doubt founded upon some good reason. It must not arise from a merciful disposition or a kindly, sympathetic feeling, or a desire to avoid performing a disagreeable duty; it must arise from the evidence or lack of evidence. It must not be a [484] mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities; it must be a substantial doubt, such as an honest, sensible, and fair-minded person might with reason entertain consistent with a conscientious desire to know the truth.

You must use your common sense as men and women of experience and possessing some knowledge of worldly affairs, and if, after examining carefully all of the facts and circumstances in this case, you can say and feel that you have a settled and abiding conviction of the guilt of the defendant, then you are satisfied of his guilt beyond a reasonable doubt. If you have not such a conviction, then you should acquit him.



Now each count of the indictment, that is Counts I, II and III, is brought under a section of the Internal Revenue Laws which reads as follows:

“ \* \* \* any person who wilfully attempts in any manner to evade or defeat any tax \* \* \* or the payment thereof” \* \* \* shall be punished.

The essential elements of the crime charged in the indictment herein are three, as I set them out. The first is, that the defendant owed more income tax than shown on his return during the taxable year charged. You must find that fact before you proceed with the next. Second, that the defendant knew that he [485] owed more income tax than shown in his returns. Third, that he wilfully attempted to evade or defeat any part of such tax by filing a false return.

If you find the existence of each of these elements beyond a reasonable doubt as to each count or counts which you so find, you should find the defendant guilty as to such count. If you have any reasonable doubt as to the existence of any of these elements, you should acquit him as to such count or counts.

Let me repeat, before you can find the defendant guilty as to any one of the three counts here charged, you must find beyond a reasonable doubt that the Government has established each of the foregoing elements as I have outlined them to you. If you entertain any reasonable doubt as to the existence of any one of these elements, in any one of the three counts, then you will acquit him as to such count or counts where you entertain such reasonable doubt.



We are here trying the defendant on three separate and distinct charges, similar in nature but covering different periods of time. It is necessary, before the defendant can be convicted on any one of these three charges, that the Government must have proved to [486] your satisfaction that he owed more income tax than shown in his return during the taxable year charged; that he knew he owed more income tax than shown in his returns; and that he wilfully attempted to evade or defeat any part of such tax by filing a false return. That is merely a repetition of what I heretofore stated to you.

You are instructed that the Government is not obliged to prove an attempted evasion of the entire amount of the tax as alleged in the indictment; it is sufficient that the government has proven beyond a reasonable doubt that the defendant attempted to evade any substantial portion of the tax liability for the years here in question, and not for any prior years.

The indictment, as an essential element of the offense charged, involves criminal intent. The indictment uses the word "wilfully" in charging the acts and things alleged to have been done. You are instructed that the term "wilfully" as used in the law and applied to this case, includes some element of an evil motive, and a want of justification, in view of all the financial circumstances of the taxpayer as shown by the evidence.

The intent with which an act is done is an act of the mind, seldom, if ever, susceptible of proof by direct and positive evidence. It is to be arrived

at by such just and reasonable deductions and [487] inferences from all of the surrounding facts and circumstances, and from all of the evidence in the case, as the guarded judgment of a careful and cautious man or woman would ordinarily draw therefrom.

It is not necessary to prove that the tax was due and was actually evaded, but it is necessary to prove that there was a wilful and positive attempt to evade the tax, in any manner, or to defeat it by any means.

So, in this case, in order to find the defendant guilty of any of the three charges contained in the indictment, you must be satisfied beyond a reasonable doubt that he wilfully attempted to evade the tax, or some part of it, which was due the Government and that there was an intent upon his part to commit the offense alleged.

You are instructed that, if you find from the evidence that the defendant committed or attempted to commit some other offense other than the one charged in the indictment, such finding does not justify you to find the defendant guilty of the crime charged in the indictment. And the Court is here making specific reference to the testimony of the witness, Mr. Nielsen, the Government witness who testified as to an attempt [488] to bribe him, and the refutation of that testimony by the defendant himself, that you, in weighing and considering the testimony of these two witnesses on that issue, conclude that the testimony of Mr. Nielsen stands up and is entitled to belief over that of the defendant,

then you could consider it, because the Court has held it to be competent testimony, but you could not say that fact establishes the ultimate fact in this case. Such evidence standing alone cannot establish guilt. It is submitted to you as a circumstance only, which can be considered with other facts and circumstances in determining the guilt or innocence of the defendant, and for no other purpose. Or, if you believe the testimony of the defendant over and against that of the witness, Nielsen, then you should disregard the incident entirely in weighing and considering the ultimate verdict.

Now it is not incumbent upon the Government in a case of this nature to prove that the defendant attempted the evasion of the entire amount of tax involved in the case, but it is incumbent upon the Government to prove beyond a reasonable doubt that he attempted to evade a substantial portion of the tax liability as set forth in the indictment.

You are further charged that it is not incumbent upon the Government to prove that it lost any tax as a result of the filing of the returns, but it is incumbent upon the Government to prove beyond a reasonable doubt that the filing of the returns contained [489] false statements or representations knowingly and wilfully made with the attempt to evade the payment.

I have stated to you that wilful intent is an essential element required to be established before you can convict the defendant of the charge contained in the indictment. You must, therefore,

find beyond a reasonable doubt that there was a wilful intent on the part of the defendant to evade his income tax, or some part thereof, for the years '43, '44, and '45; and you must likewise find that there was a wilful intent to make false and fraudulent statements as charged in the indictment. In other words, you must be satisfied beyond a reasonable doubt that there was on the part—on the part of the defendant a wilful intent to commit the offense charged in the indictment; and in determining whether there was such an intent, you will give consideration to all of the facts and circumstances as shown by the evidence in this case.

Now the evidence is divided into two classes: first, positive and direct evidence; and second, circumstantial evidence. Circumstantial evidence is quite as competent as direct evidence when certain rules are applied to its weight and consideration, and I think in this case that the Government relies upon circumstantial evidence to establish the [490] income of the defendant as being greater than that shown by his tax returns for the years in question here, 1943, '44 and '45.

It calculated the net worth of the defendant at the close of the tax year of 1942, and the beginning of the tax year 1943, and then, calculating from that basis, as a net worth, at the close of each of the succeeding three years, it charges the defendant with earnings as evidenced by the increase in his net worth for each of these years. The Government therefore relies upon the fact that when such

an increase is shown, it has established circumstantially that such income was taxable income and was acquired by the defendant in each of the years 1943, '44 and '45.

Now an essential element of the offense herein is that the defendant's taxable income was greater than that which he reported. If such fact is not proven, then you would find the defendant not guilty.

If you find from the evidence that the increased net worth of the defendant in the years in question here measured the taxable income of the defendant in a substantial amount over that reported by the Collector—by him to the Collector of Internal Revenue, such fact would be one of the essential elements in the charge which the Government makes. You would [491] then consider it together with all of the other facts and circumstances given in evidence in this case, and then determine whether his actual taxable earnings during the years '43, '44 and '45, are established by the evidence to your satisfaction beyond a reasonable doubt when measured by the net worth at the beginning and ending of the year.

If you are not satisfied from the evidence that the difference shown between the beginning and the ending of the year—of the taxable years in question results in a sum substantially greater than that actually reported, then it would be your duty to acquit the defendant.

In considering this matter, the defendant—in considering this matter, if you can reasonably



account for the increased net worth of the defendant from the beginning to the end of the year upon any reasonable theory or hypothesis that will admit of his innocence, it is your duty to do so and to acquit him.

The Government, under the evidence submitted in this case, must satisfy you beyond a reasonable doubt that all of the facts and circumstances upon which it relies are true, but they must also be such facts and circumstances as are incompatible on any reasonably hypothesis other than the guilt of the accused. [492]

If the testimony in this case and its weight and effect can be such that two conclusions can reasonably be drawn from it, one favoring the defendant's innocence and the other tending to establish his guilt, the jury should adopt the former, which favors innocence, and find him not guilty.

Now that's the rule of circumstantial evidence.

The jury are the sole judges of the facts in the case, as I have already indicated to you. You are also the judges of the credibility of the witnesses, and of the weight and the value to be given to their testimony.

Now in determining as to the credit you would give to a witness, and the weight and the value you would attach to his or her testimony, you may take into consideration the conduct and appearance of the witness on the stand; the interest of the witness, if any, in the result of the trial; the motive actuating the witness in testifying; the witness' relation to or feeling for or against the plaintiff or defendant, as the case may be; the proba-



bility or the improbability of the witness' statements; the opportunity that the witness had to observe or to be informed concerning such matters respecting which the witness testified to; [493] and the inclination of the witness to speak truthfully, or otherwise, as to the matters within the knowledge of such witness.

Now all of these matters being taken into account, together with all of the other facts and circumstances given in evidence, it is your province to give to the testimony of each witness such value and weight as you deem proper. If, upon the consideration of all of the evidence, you conclude that any witness, irrespective of what his or her motive might have been, has wilfully sworn falsely as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony, except insofar as it may be corroborated by other credible testimony in the case.

In this case the defendant has seen fit to take the witness stand in his own behalf. That's his constitutional right, if he wants to do so. When he does, he is judged by exactly the same standards that the other witnesses are, as I've indicated to you, except for the further consideration of the deep personal interest that he has in the outcome of the case.

Now you will not single out any one of these instructions in returning your decision, but rather you will consider them all together and as a whole. [494]

I feel that I should say a word to you concerning the document that has been referred to by both counsels. The matter contained in the document will perhaps be substantially covered by all the testimony of the accountant who drafted it. The document itself, however, contained matter that the Court felt as a matter of law, was not competent to go to the jury. And therefore you, in your deliberation, will give no concern to what counsel on either side may say was in that document; but the Court rejected the offer, and when any offer of evidence is made, in either a civil or a criminal case, and the Court rejects it, that should be the end of it so far as the jury is concerned. The judge has the responsibility if he has made a mistake on the law, and it can be corrected by a higher court; but when you determine a fact, there is no particular provision made for correction of your determination on facts.

However, you must not base your facts upon things that have been excluded. What I have said about this single document applies to all of the offers of proof and the rejections, and likewise applies to the arguments made by counsel on both sides, where the Court might have interrupted them. Those are all things [495] that come within the hearing of the jury, but actually are of no concern to the jury, and there have been instances already in this case and there will be others where we have to send you out and then bring you back again before you have the case finally fully submitted to you.

Now, when you retire to your jury room to deliberate upon your verdict, it will be your duty first, to select one of your number as foreman, who will speak for the jury when called upon by the Court to do so, and who will sign your verdict when it has been agreed to. No verdict can be returned in this case except by the unanimous finding of all twelve of you.

The Clerk has prepared a form of verdict. This form of verdict lists the counts in the indictment and the name of the defendant, and it reads, generally, in this form:

“We, the jury empaneled in the above-entitled case, find the defendant, John Barcott,” and then there is a blank, and following the blank, the words, “Guilty as charged in Count I of the indictment,” and the same as to Count II and the same as to Count III.

If you find the defendant guilty on any of the particular counts, it is unnecessary that you [496] insert any words in the blank space.

If you find the defendant not guilty on any count, you will then put the word “not” in the blank space before the word “guilty.” If you find the defendant guilty on some counts and not guilty on others, you will make the proper entry.

Now you will have with you in your jury room a copy of the indictment, and I repeat again what I said at the outset, the indictment is not evidence itself. It is merely for the purpose of making plain to you the nature of the charge. You will have

with you, however, in your jury room, all of the exhibits which have been offered in evidence and which are admitted and which are for your consideration.

I am going to give you this suggestion: you can either take it or reject it as you see fit, but only in the hope that it might aid you in expediting your deliberations. First, I want to say that no juror is expected to give up a firm conviction and surrender to other jurors. Neither is any juror supposed to take an attitude that is adamant and decline to listen to reason. So when you get into your jury room and have organized the jury by the selection of a foreman, before a ballot is taken in a case that has taken several days to try, my suggestion would be that you seat yourself around the [497] table, with the foreman at the head of the table, and starting out on the right or left—I suppose depending upon whether he was a right-handed person or a left-handed person, go to each juror and let them express their views briefly and such things—go around the table in that manner. That will bring into the discussion the various exhibits. And then see how their differences might be reconciled, and take a ballot.

Now you are not being compelled to follow that procedure, but I have found that it does aid in making a disposition of a case. If your ballot indicates a difference of opinion, then the wise thing is to cross that ditch in a kindly, friendly manner, objectively, and without any private opinion, because jury service is not for the purpose of vetoes and walking out on affairs.

I have unfortunately had jurors in years gone by, where they would divide fairly equally or rather, one sidedly, and one group would get over in one corner of the jury room and the other group get over in the other corner and they would have nothing to do with each other any more. Well, that isn't the purpose we bring you in here, and neither the defendant in this case nor the government, nor any of us, want that, and I am sure that the unusual attention that you have displayed during the progress of this trial—certain features of which [498] are somewhat complicated because they involve figures—that you are going to make a like effort to ascertain what the truth is by a collective judgment of twelve of you.

Now let me say to you in conclusion: You have each taken a solemn oath that you will well and truly try this case and a true verdict render upon the evidence in the trial and upon the law as given you by the Court. You have nothing whatever to do with the punishment to be inflicted in case there is a violation of the law. The fact that punishment may follow a conviction cannot be considered by you, except insofar as it may tend to make you careful.

As stated to you in the opening of this charge, you must not allow yourselves in the least to be moved by sympathy nor influenced by prejudice.

The question of guilt or innocence is a question of fact, not a question of prejudice nor what shall the punishment be. If, as a matter of fact from the evidence the defendant is guilty, no amount of



sympathy will make him innocent. If the defendant is innocent, no amount of prejudice would make him guilty, for regardless of what the penalty may be, regardless of any feeling of prejudice or sympathy, the defendant is, upon the evidence and the evidence alone, either guilty or not guilty. Now what is the proper verdict, as shown by the evidence, is the one question before you.

The court: Any suggestions, Mr. Pomeroy?

Mr. Pomeroy: I have none, your Honor.

The Court: Mr. Gagliardi, do you?

Mr. Gagliardi: I have none, your Honor.

The Court: Very well, the jury will retire to the jury room to deliberate on your verdict, and I might state to you that I will be subject to call until 10:00 o'clock tonight. That does not mean that you should take that much time, but then I am just advising you that if you haven't a verdict then, we will have to consider whether we will put you to bed.

(Whereupon, jurors retire to deliberate upon their verdict) [500]

November 24, 1947. 10:00 o'Clock A.M.

The Court: Docket 15845, United States vs. John Barcott, a motion for new trial. Are the parties ready?

Mr. Ursich: Yes, your Honor. If your Honor please, our motions in this case are for a judgment notwithstanding the verdict or a motion for a new trial. In the alternative for a motion for a new trial, our chief grounds of contention for a



judgment of acquittal, if your Honor please, is the failure of the Government to make out a case, according to the indictment and as limited by the bill of particulars.

In commencing any argument in this nature, I feel that it doesn't hurt at all to go back to the sixth article of our Federal Constitution, where it states that the accused shall be informed of the nature and the cause of the accusation. Now, throughout our entire history, if your Honor please, this has meant that he shall know what he is charged with and he does not have to defend himself against anything except that with which he is charged. Under this system we have a right to rely upon the allegations of the indictment and the bill of particulars, and if [501] the Government does not prove the commission of the crime in the manner in which it has charged, it has failed in its proof, and acquittal should be ordered for the defendant.

Now, according to the indictment, as clarified by the bill of particulars in this case, the defendant was charged with failing to report certain dividends, certain interest, and money which he received from a business known as the California Oyster House, during the specific years '43, '44 and '45. Being thus specifically informed, he entered a plea of "Not Guilty," throwing the burden directly on the Government to prove that which they said they were going to prove. They had to prove a failure to report interest during one of those three years, or all of them; they had to prove a dereliction in the reporting of the interest; they also had

to prove that the defendant defrauded the Government by failing to report a portion of his income from the Oyster House. Now that's what they had to prove. That's what the defendant came into Court ready to defend——

The Court: I don't think we need to waste any, or put in any time on that argument at all, Mr. Ursich, because the Court is not in accord with your views. [502]

Mr. Ursich: I feel that your Honor was in the commencement, and I feel now——

The Court: The bill of particulars is not the indictment or part of the indictment, and it does not modify and cannot amend the indictment.

Mr. Ursich: No, your Honor—but I——

The Court: And the offense charged here, the specific offense is a wilful attempt to evade the payment of income tax; and whether that tax was interest on bonds, or what not, if the proof is that there was any of it—any substantial amount of tax sought to be evaded, why the case is made.

M. Ursich: If your Honor please, I have a few citations on the bill of particulars. I don't know whether your Honor wishes to hear them or not.

The Court: Not unless they come within this new rule.

Mr. Ursich: I will say this on the new rule, I have examined it rather thoroughly and I find the comments on that, the committee comments, that the rule—there has been no substantial change in the rule, relative to bill of particulars. And I found no cases which state that once a bill of par-

particulars has been given, that the Court may thereafter disregard the specific statements set forth in the bill of particulars, and then go back to the general allegations of the indictment. I haven't found any, if your Honor please.

The Court: Well, do you contend that if there was a failure to prove that there was interest on bonds that then there was a failure of proof in this case?

Mr. Ursich: No, your Honor, I don't. I contend this, that there—as far as interest on bonds were concerned, there was no proof. The Government itself admitted that. And on dividends there was no proof of failure to report. That was admitted. The facts then came down to a failure to report income from the business, a specific business, the California Oyster House. Now that's what the case hinged on. That's what we came in here to defend. Then when we come in here they throw a net worth theory at us, and they don't prove a thing. They don't prove anything. They don't show that we have taken a single cent out of that Oyster House which should have been reported to the Government. And your bill of particulars, as I say to your Honor, I have examined the new rule and the commentaries of the committee, and they simply state in there that the rule as pertaining to bill of particulars is the same as it was in the past. There is no change in it. [504]

I realize there has been changes in several regards where you—where under our judicial code, our new judicial code, you look actually to a question of

prejudice rather than to one of form. I realize that. But, there has been no change in the bill of particulars at all that I have been able to find. If I had, I would—I wouldn't make this argument, or at least, I would inform your Honor. But when they say that that's what they are going to prove, I think we are limited.

It's no different than the—than a morphine case which went on the basis of a formula, the defendant was charged with selling morphine and he asked for a bill particulars to set out what formula it was, and he said it was some—the Government stated that it was a certain derivative of morphine. The defendant came in to defend and they proved—the Government proved that it was another derivative of morphine, very little difference between them. The Court submitted the matter to the jury and the defendant was found guilty, and on appeal to the Circuit Court, the Circuit Court said, "No." It says, "You charged him with a certain, specific matter. He has come in to defend on that certain, specific matter. You haven't proved it." And they threw the case out, and I think properly so. And they stated therein that even [505] though that may be technical, that still it was sound law. Now, there's a difference between, as I see it, a matter which is prejudicial and which isn't, and one which is technical and one which is not technical. It may be sound, even though it is technical. I feel—I feel, frankly, that failing to—failing to prove what they allege in this case, that they just haven't made a case.

The Court: Mr. Ursich, if the jury believed the Government's witnesses, they believed that the income, at least a major part of it, came from the California Oyster House——

Mr. Ursich: Well, a portion——

The Court: ——that item was included in the—— in your bill of particulars, so you have no basis to complain that the Government made proof outside of the bill of particulars. You might complain that they didn't prove each item, or offer any proof on each item of the bill of particulars.

Mr. Ursich: Of course, that, your Honor, when your Honor states that, you arrived at a conclusion that the jury must have assumed. The only way they could have reached a conclusion was on the basis of assumption that it came from the—from the Oyster House.

The Court: No, I didn't say that they [506] assumed it; I said they must have found.

Mr. Ursich: Yes, your Honor, they must have found. I agree with you there, but that finding must have been based on assumption. It couldn't have been based on any evidence, because there wasn't any. All of the testimony, even on the net worth theory, all the testimony of Mr. Swanson was based on assumptions. Time and time again in there when he was asked how he arrived at that, he had assumed figures all the way through. And even if you are going to go on a net worth theory, you've got nothing but assumption in the entire case. There is several places in his testimony, which



I have here, where he says, "I assumed that this money came from the Oyster House." That's in his testimony.

The Court: The Court is quite familiar with the testimony. I followed it very closely. And upon that ground, I am satisfied, Mr. Ursich, that you have no basis upon which to rest—or that the Court would have no basis upon which to rest a finding that there was such error committed, and that this verdict be set aside.

Mr. Ursich: Just in closing, I don't want to go further on this question, I just want to say to your Honor this, that I believe we have examined every income tax which has been appealed, and we have not, assuming [507] the correctness of the theory, we have not found any case, not a single case, that was drawn criminally on straight net worth. In each and every case that we have examined there has been specific proof of a—of money earned in that certain year.

The Court: Well, I don't know what cases you have in mind; but if your position were sound, all the taxpayer would need to do is destroy all of his records, if he is in business, and thus defraud the Government of income tax and be immune. The situation of net worth arises only where the taxpayer has not kept records, and in this case the evidence was uncontradicted that this taxpayer kept no records whatever.

Mr. Ursich: He—well, of course that's your Honor—



The Court: That's the purpose of the Treasury regulation, evidently, in taxing for civil liability---

Mr. Ursich: That is correct.

The Court: ---is based upon the net worth. These regulations, while not statute, carry with them in many instances an authority equal to the statute, because the statute confers upon the Treasury Department the right to make regulations for their effective enforcement.

Mr. Ursich: The—I have to agree with [508] your Honor, as far as civil is concerned, that a man may be found to owe a tax by reason of his failure to keep adequate records, and he may be penalized up to fifty per cent, but I still say that's a long ways from making the man a criminal. I know of nothing—I know of no case, no law, which states that on straight net worth, even though a man is derelict in the keeping of his books, that fact alone isn't sufficient to convict him.

The Court: The net worth, as the Court charged in this case, becomes a circumstance for the jury to consider, together with all of the other facts and circumstances as to whether there was a wilful attempt to evade tax.

Now, are there some other phases of your motion, Mr. Ursich, that you desire to argue?

Mr. Ursich: Yes, your Honor, there are—there are just two other points which I shall touch on briefly. I will say that the argument I have been making is our chief argument.

With reference to Mr. Nielsen's testimony, he made a statement about when he first saw Mr. Barcott. I think he stated as follows: "I told Mr. Barcott the purpose of investigating such transactions was to determine if the money was used in black market activities, and if the [509] money was properly reported for income tax purposes." On the basis of that preliminary statement, the Court allowed certain evidence—certain testimony of bribery to be admitted by Mr. Nielsen. I submit to your Honor that that element of bribery, of course, is only a circumstance to—tending to show guilt, that it must specifically relate to the crime which is being investigated.

Now, in this case the witness testified that he called to his attention black market activities as well as income tax matters. Now, the question arises whether or not the man—whether or not the defendant, if we believe the testimony of the witness, had a guilty mind as to income tax evasion or whether or not he had a guilty mind as to black market activities. I can't see how, on the basis of that preliminary testimony, the Court should have allowed that evidence to be submitted, because this again reaches the realm of speculation, where a man is being investigated for two crimes and at one time he makes an offer for his liberty, how is the Court, the jury, or anyone else to tell what he is trying to—wherein lies his guilty mind, unless he is charged with both crimes. I submit to your Honor that that is quite a stretch, to allow that testimony to have been admitted in this case under those circumstances. [510]

I call your Honor's attention to some cases which we have read in regard to the defendant's flight. They go on the same basis as offers of bribe, that is, they show a guilty mind. In those cases where the defendant fled when he was charged with a different crime, and the evidence was offered in the case, the Courts have held that it certainly couldn't show any evidence of guilt as to the specific crime with which he is now charged.

Now, I frankly say to your Honor that that's as close as we've come on this subject. But, it seems to me common sense would dictate, under these circumstances, particularly where evidence of that nature is so vitally damaging, where it is not clearly set out in the preliminary examination, and specifically pegged down to the case which—to the charge in the indictment, that then the matter should not be submitted to the jury.

On your Honor's instructions, I only have this comment to make: We feel as a whole the instructions were as fair as any that were—that we have ever heard given by any Court. We do wish to call your Honor's attention to the one that went on the net worth basis. Our theory throughout was that there was no such thing as a net worth theory in this case, and that your Honor failed to—your Honor erred in instructing on that theory. [511] We didn't even object at the time, for the reason that the entire case had gone on that basis, and we couldn't see where any other—where a special objection to the instruction would have done any good;

either the case falls on the testimony, or it's made on the testimony. If the testimony is in correctly, your Honor's instruction is correct.

That's all that we have, your Honor.

The Court: Do you desire to make an argument, Mr. Hale?

Mr. Hale: I won't make any.

The Court: The motion for a directed verdict, which was made at the conclusion of the trial, before the case was submitted to the jury, and is now made again, will have to be denied.

And, likewise, the motion for a new trial will be denied.

The complaint that is made as to errors committed during the course of the trial rests primarily upon the basis that the Government's proof was not direct and specific but was circumstantial, the Government relying upon net worth from year to year rather than relying upon actual proof as to what the income of the defendant was. When a motion for a bill of particulars was made in this [512] case, I expressed some doubt whether the facts were such as to justify, in the exercise of sound discretion, the making of an order granting such a motion, but did grant it, and the Government submitted a bill of particulars reciting three different sources of income, the principal and primary source being from the business known as the California Oyster House. The proof, as I recall it, was meager, or not at all, on two of these items; that is, the proof indicated that there were dividends received, and that there was interest received, but not that it was

falsely returned. On the other hand, it would be impossible to say whether it was the interest money that was deficient in the aggregate return, or whether it was from some other source.

Then the proof as to income from the business was dependent upon the calculations made upon net worth during the years here involved. It seems to me a taxpayer is not in a very good position to complain when the Government, in the collection of its income taxes, is compelled to resort to that method, when he himself has violated the regulations and the spirit of the act, if not the letter of it, by failing to keep any records whatever. If such were the case, then every dishonest taxpayer who is engaged in business could avoid the liability of criminal penalties, [513] by merely destroying his records, from day to day or year to year. In this case, the jury were warranted in finding that these records were destroyed. If a cash register is kept, and the tape on the cash register—that certainly could have been preserved. The customers paid for their meals on little checks that were given them. They might have been preserved, but all record was lost in this case.

And the net worth theory adopted by the Government indicated a tremendous increase in wealth during the years involved. And there were many other circumstances in this case that pointed a strong finger of guilt toward the defendant in his attempt to evade the payment of his taxes. He offered evidence showing how his wealth had been accumulated during the lean years of business in



Tacoma and in the nation as a whole, and how during the prosperous years his business was making a far less income than that indicated by the Government's testimony. The jury evidently saw fit not to accept that explanation, and I am not surprised that they did not, because it's scarcely in keeping with reason.

The defendant complains and asks for a new trial because the Court permitted testimony of an attempted bribery, stating that the defendant was under the [514] impression that perhaps he was being investigated for black market activities. I cannot recall a word of testimony by the Internal Revenue agents that they ever stated to the defendant that they were investigating him for black market activities. The whole testimony, as I recall it, was that they were checking on him for the purpose of ascertaining if he had attempted to evade income tax.

And the circumstances of having large sums of cash in his possession, having two safe deposit boxes, and having no records whatever of a substantial business, all point to the fact that he had full knowledge that he was being investigated for the failure to make full and complete and honest proper returns; and the jury must have found, and I do not hesitate to say that there was substantial evidence for them to find, that he did attempt to bribe the Internal Revenue agent; and if the agent had of been of the low standards, such as the defendant apparently thought him to be, and had have taken a bribe, why, of course, the case might never have been heard of again, and again it might have.



Now, if it's conceivable to visualize a circumstance that indicates guilty knowledge, such actions certainly fall within that category. I confess that that [515] evidence was extremely damaging to the defendant. The jury found it was true. The fact that it was against interest and damaging, would not make it incompetent, but quite the contrary.

On the question of instructions, I have already, I think, covered that by what has been said concerning the admission of evidence in the trial of the case on the theory that net worth would have to be the basis of what the income was. So for these reasons, among others, I shall deny the motion, likewise, for a new trial; and since the Court heard this testimony and heard the defendant's story and his wife and friends and others, I see no particular need for a probation officer report in this case, and the record, therefore, will show that a pre-sentence report will not be required.

I would hesitate for another reason to ask for a pre-sentence report, although I would ask for it if I were in doubt concerning the background and history of this defendant; but I dislike to ask for it if the defendant should desire to appeal, and if this Court were reversed on such appeal, a pre-sentence report might at least be thought to be prejudicial to the defendant if another trial were granted. I do not want to place him in a position where he might be embarrassed in that manner. While these [516] pre-sentence reports are supposed to be in the hands of the Court only, the Department of Justice occasionally requires that they be

sent to other agents of the—of that Department, and I shall not ask for any pre-sentence report in this case. But the defendant may come forward and the Court will pronounce the judgment and sentence.

Mr. Barcott, do you have anything that you want to say before judgment and sentence is pronounced in this case?

Mr. Barcott: No, I have nothing to say.

The Court: Mr. Ursich?

Mr. Ursich: I think your Honor has a sufficient knowledge of this man's background, and he will take it into consideration when he does pass sentence.

The Court: Mr. Barcott, in this case, and in similar cases, it is always the unusual situation where the defendant has a clear record heretofore. Everything indicates that in all the years that you've lived in Tacoma and in the United States, you have complied with the law, your record has been good, you have raised a family, you have two fine sons, you developed a little business into a very lucrative one; and were you the only offender of this kind that ever came before the Court, I wouldn't have the slightest hesitancy in granting probation and the assessment [517] of a fine, but in this type of case the Court cannot—I feel I cannot consistently do so and hope to ever accomplish the purpose that Congress had in mind when they enacted the penalty provision of income tax laws.

Punishment in these cases is more a deterrent to others who might do as you have done, and the jury

found that you did, than it is to reformation of the individual. No sentence in the penitentiary, however long, nor however short, is going to reform you, and that might be said of each defendant who appears in this Court for violating income tax laws; but a penalty that is assessed to you might be a warning to the hundreds of others who in years of prosperity refused to share, as the law called upon them to do, their income with their Government. And, of course, the Government couldn't exist if it didn't collect tax. There are some thirty or forty million taxpayers. The Government couldn't exist if they had to assume that every one of us were trying to cheat it, and had to explore each of our returns.

So the Government must rely, of necessity, and it does very successfully, upon the honesty of the individual, being extremely liberal, and when there is a question of doubt as to whether they owe money or don't owe money, they resolve the doubt in their own favor, and they [518] are rather expected to do that. But when they go beyond that, then the Government says if it's done with knowledge and understanding and wilfully, it's a crime. But, they have adopted a policy, and there is law that supports the policy, that when the individual, even if he has wilfully cheated the Government, comes forward afterward and seeks to file an amended return and confesses his shortcomings and pay all of the penalties, a criminal prosecution rarely ever follows, because the policy of the Treasury is to invite people to come in and pay, and it assesses civil penalties,

and be forgiving; but when the Government is compelled to ferret out these shortcomings, as in your case, and in other cases, then they not only assess the civil penalties but they call upon the citizen to answer on the criminal side. When the individual comes in Court, after all of the facts have been discovered, and then confesses his shortcomings, he places himself in a somewhat better position than when he comes into Court and denies all of the charges that have been made against him, he becomes a witness in his own behalf and calls others to do so, and adds to that wrongdoing the further offense of false testimony, well, we have a different situation again.

Now I feel in your case with the verdict of the jury, which to me, was based upon substantial [519] evidence, fully warranted, that you did just those things. In your own mind, you might irrationalize to the degree that you feel that you didn't mean to cheat anybody, and you didn't, that may be your conviction. Your attorneys have presented your case very ably, and they have accepted your statements, as they should. The jury did not, and the Court is inclined to agree with the jury. The jury, by their finding, it seems to me must have determined that you thought you could "buy off" an officer of the Government by giving him five hundred dollars.

It is unfortunate that you entertained such a view concerning public officials. It may be that some of them are of that low type that they have so little regard for their oath, and their country, as to "sell out." But, that's rarely found in officers such as

do the work for the Internal Revenue Department or other of these older established Government agencies.

I am not going to assess any punishment for attempted bribery, nor for perjury; but you are not in a position where you have a right to ask the Court to be extremely lenient with you because you have been penitent and you are sorry for what you have done. You have adopted quite the contrary attitude. According to these figures, roughly, on your half, if you had not have been discovered you [520] would have gotten away with five thousand dollars of money that belonged to the United States Government, and an equal amount in your wife's return, which would have been ten thousand dollars, over this three years. Now you will have to pay all of that, plus penalties perhaps of fifty percent of the amount. In addition to that, you are called upon to answer to this criminal charge, and you have brought disgrace upon yourself and your family in your declining years.

I wish that it were possible for every taxpayer who thought that they could withhold money that belonged to their government because the government had created a situation where they had become prosperous, to fully appreciate and understand your plight; and I am sure that there would be millions of dollars that the Government isn't now getting that they would be getting then. If there is any field of public offenses where crime does not pay, when once detected, it's in this matter of paying



Federal taxes—income taxes, because the penalties that pile up far exceed what it would have cost if the tax had been paid.

The jury, by their verdict, having found you guilty, it is the judgment of the Court that you are guilty. The sentence of the Court on count one of the [521] indictment, that you be committed to the custody of the Attorney General of the United States, or his duly authorized agent, to serve a period of ten months and to pay a fine of seven hundred and fifty dollars; on count two of the indictment, a like sentence and a like fine; and on count three, a like sentence and a like fine; and the sentence will carry the costs of this prosecution. The jail sentences, or confinement sentences, will run concurrently and not consecutively. In other words, the sentence will be one of nine months. The fines, however——

Mr. Sager: I thought you said “ten.”

The Court: Or ten months, I mean. The fines, however, will be separate as to each count, or a total of two thousand, two hundred and fifty dollars, and costs. Now, what is the bond in this case?

Mr. Ursich: Twenty-five hundred dollars, if your Honor please.

The Court: Unless you show some reason to the contrary, Mr. Sager, I see no reason to increase the bond, if you intend to appeal; if you do not intend to appeal, then the defendant will forthwith be taken into custody.

Mr. Ursich: No, your Honor, we do intend to appeal.



The Court: Well, the bond will remain [522] then at twenty-five hundred dollars. The defendant is a family man, and living here, and I see no reason to increase that bond. And you will come back into Court at eleven-thirty? Can you be in, Mr. Sager?

Mr. Sager: No, that's going to crowd me some way or other.

The Court: Eleven-forty-five?

Mr. Sager: I think probably by that time, yes.

The Court: And then the Court will sign the formal judgment and sentence.

Mr. Sager: Very well, your Honor.

Certificate

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,  
Official Court Reporter. [523]

[Endorsed]: No. 11803. United States Circuit Court of Appeals for the Ninth Circuit. John Barcott, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed January 29, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11803

JOHN BARCOTT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

Comes now the appellant through his attorneys of record and respectfully submits the following statement of points upon which he will rely in his appeal in the above entitled cause.

I.

The Court erred in denying the defendant's motion for judgment of acquittal, or in the alternative for a new trial, on the grounds and for the reasons as set forth in said motion. (Transcript of Record, pp. 41, 42.)

II.

The Court erred in denying defendant's motion for judgment of acquittal at the conclusion of the plaintiff's evidence. (Reporter's Transcript of Testimony, pp. 119-134, inc.; 136-142, incl.)

## III.

The Court erred in denying defendant's motion for judgment of acquittal at the conclusion of all the evidence. (Reporter's Transcript of Testimony, pp. 438-441, incl.)

## IV.

The verdict is contrary to the weight of evidence and is not supported by any substantial evidence. (Reporter's entire Transcript of Testimony.)

## V.

The Court erred in denying defendant's demand for an offer of proof and objection to testimony of the witness Nielsen concerning the purported bribe offer. (Reporter's Transcript of Testimony, pp. 22, 23.)

## VI.

The Court erred in denying defendant's motion to strike purported testimony of the witness Nielsen pertaining to purported bribe offer. (Reporter's Transcript of Testimony, pp. 24, 25; 32-37, incl.)

## VII.

The Court erred in overruling defendant's objection to plaintiff's Exhibit No. 11. (Reporter's Transcript of Testimony, pp. 58, 59.)

## VIII.

The Court erred in overruling defendant's objection to the testimony of the witness Swanson pertaining to defendant's alleged net worth. (Reporter's Transcript of Testimony, pp. 77-96, incl.)

## IX.

The Court erred in failing to instruct the jury in a manner set forth in defendant's requested Instruction No. 2, and in failing to otherwise instruct that the Government was under the burden of proving beyond a reasonable doubt that the income alleged to have been received by the defendant during the years 1943, 1944 and 1945 and upon which no tax was alleged to have been paid, was derived from the sources set forth in said indictment as particularized in the bill of particulars. (Transcript of Record, pp. 29-37, incl.)

## X.

The Court erred in instructing the jury on the theory of net worth for the reason that:

(a) The evidence of the Government failed to establish any net worth of the defendant during the years 1943, 1944 and 1945 except by conjecture and speculation.

(b) That said instructions create a fatal variance between the pleading and the proof by authorizing the jury to convict the defendant without regard to the sources from which he is charged with having derived his income and upon which he failed to pay a tax. (Reporter's Transcript of Testimony, pp. 490-492, incl.)

## XI.

The Court erred in submitting the cause to the jury on the theory of increase in net worth of the defendant during the years 1943, 1944 and 1945. (Reporter's entire Transcript of Testimony.)

## XII.

The Court erred in failing to limit the Government in its proof in conformance with the indictment and bill of particulars, and in allowing the Government to offer evidence in substantial variance therewith. (Reporter's Transcript of Testimony, pp. 72-116, incl.)

## XIII.

The argument of counsel as appearing on pages 471 and 472 of the Reporter's Transcript of Testimony was of such a highly inflammatory and prejudicial nature, and which argument was without the issues and unsupported by the evidence as to amount to misconduct of counsel which was incurable by the Court's instruction to the jury to disregard a portion thereof.

## XIV.

That the Government failed to prove that the defendant derived any income whatsoever during the years 1943, 1944 and 1945 upon which he failed to pay an income tax. (Reporter's entire Transcript of Testimony.)

## XV.

That the Government attempted to prove the net worth of the defendant during the years 1943, 1944 and 1945, respectively, by merely showing expenditures during those three years, but without showing

any unreported income whatsoever, and without offering any evidence as to the defendant's actual net worth prior to 1943. (Reporter's Transcript of Testimony, pp. 18-37, incl., 72-116, incl.)

XVI.

That the entire Government's case is speculative and conjectural in that it is based upon an estimate as to the defendant's earnings and income from the years 1919 to January 1, 1943, and such estimate is wholly unsupported by any evidence whatsoever.

Respectfully submitted,

GAGLIARDI, URSICH &  
GAGLIARDI.

/s/ FRANK HALE,

Attorneys for Appellant.

Copy received February 10, 1948.

/s/ J. CHARLES DENNIS,

U. S. Attorney. LHB

[Endorsed]: Filed Feb. 10, 1948.



[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER, AND ORDER  
ELIMINATING EXHIBITS FROM THE  
PRINTED TRANSCRIPT

Comes now the appellant above named and by and through his attorneys respectfully makes application to the court that all of the exhibits offered or received in evidence be considered in their original form by the court without the requirement that such exhibits be printed as a part of the record.

This application is made for the reason that many of the said exhibits are lengthy and voluminous and the printing thereof would be unduly expensive; that the court can more conveniently and expeditiously consider the same in their original form.

GAGLIARDI, URSICH &  
GAGLIARDI.

/s/ FRANK HALE,  
Attorneys for Appellant.

So ordered:

/s/ FRANCIS A. GARRECHT,  
Senior United States  
Circuit Judge.

[Endorsed]: Filed Feb. 10, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF  
RECORD TO BE PRINTED

To the Clerk of the Above Entitled Court:

Comes now the appellant above named and by and through his attorneys of record herein respectfully requests and designates that the entire transcript of record in the above entitled cause be printed, with the exception and excluding all of the original exhibits offered or received in evidence and heretofore transmitted to the above entitled court in the above entitled cause.

GAGLIARDI, URSICH &  
GAGLIARDI.

/s/ FRANK HALE,  
Attorneys for Appellant.

[Endorsed]: Filed February 10, 1948.





